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No. 92-9049

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL,
Petitioner

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? *Cage v. Louisiana*, 498 U.S. 39 (1990); *Sullivan v. Louisiana*, —— U.S. ——, 124 L.Ed.2d 182 (1993).

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Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989)	40
People of Territory of Guam v. Yang, 800 F.2d 945 (9th Cir. 1986)	21
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Smith v. Butler, 696 F. Supp. 748 (D. Mass. 1988)	41
Strickland v. Washington, 466 U.S. 668 (1984)	40
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Thompson v. Lynaugh, 821 F.2d 1054 (5th Cir. 1987)	13
United States v. Del Toro Soto, 676 F.2d 13 (1st Cir. 1982)	20
United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988)	40

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United States v. Hall, 854 F.2d 1036 (7th Cir. 1988)	13
United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988)	13
United States v. Holland, 348 U.S. 121 (1954)	12
United States v. Indorato, 628 F.2d 711 (1st Cir. 1980)	30
United States v. Ivie, 700 F.2d 51 (2d Cir. 1983)	13
United States v. Littlefield, 840 F.2d 143 (1st Cir. 1988)	13
United States v. Merlos, 984 F.2d 1239 (D.C. Cir. 1993)	13
United States v. Nolasco, 926 F.2d 869 (9th Cir. 1991) (en banc)	13
United States v. Pepe, 501 F.2d 1142 (10th Cir. 1974)	13
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State v. Chavarria, —— P.2d ——, 93 Westlaw 313170 (Ariz.App. 1993)	22, 23
State v. Manning, 409 S.E.2d 372 (S.C. 1991)	20, 30
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California Penal Code, section 1096a	2

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Allemang, Atlanta Constitution, July 21, 1991	28
American Heritage College Dictionary (3d ed. 1993)	25
American Heritage Dictionary of the English Language (3d ed. 1993)	25
American Heritage Dictionary of the English Language (1981)	25
American Heritage Dictionary, Second College Edition (1985)	25
Black's Law Dictionary (6th ed.)	19
California Jury Instructions—Criminal, no. 2.90 (5th ed., West Publishing Co. 1988)	2
Cassell Paperback English Dictionary (1990)	26
Chambers 20th Century Dictionary (1983)	18
Collins English Dictionary (3d ed.)	19, 30
Concise Oxford Dictionary (1990)	26
Dictionary of American-English Usage, A (1957)	25
District of Columbia Criminal Jury Instructions (3d ed. 1978), no. 2.09	13
Greenfield, *Why We're Still Muckraking*, Washington Post, March 20, 1985	27
Hickman, Atlanta Constitution, July 9, 1989	28
Landau, *Dictionaries: The Art and Craft of Lexicography* (1984)	26
Longman Dictionary of the English Language (1984)	18
Los Angeles Times, March 5, 1992 (Southeast section), 4	29
Los Angeles Times, December 24, 1990, Metro section, p. 8	30
May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 Am.L.Rev. 642 (1876)	10
Merriam-Webster's Collegiate Dictionary (10th ed. 1993)	18
Miami Herald, *Waldheim: The Moral Evidence Is Overwhelming*, May 1, 1986	30
Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, (55 B.U.L. Rev. 507 (1975)	6, 8

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Oxford American Dictionary (1980)	26
Oxford English Dictionary (2d ed. 1989)	26
Random House Dictionary of the English Language (2d ed. 1987)	19
Random House Webster's School & Office Dictionary (1993)	19
Richmond Times-Dispatch, *Abortion Violence*, August 27, 1993	28
Sacramento Bee, January 24, 1990	29
Sacramento Bee, *America's Loss of Respect*, January 25, 1992	29
San Francisco Examiner, July 14, 1993	29
Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850* (38 Hastings L.J. 153 (1986)	7, 34, 35
Shorter Oxford English Dictionary on Historical Principles (1992)	19
Terry, Richmond Times-Dispatch, May 13, 1993	29
Waldman, "Origins of Legal Doctrine of Reasonable Doubt," 20 J. Hist. of Ideas 299 (1959)	7, 8
Webster, *An American Dictionary of the English Language* (1828)	8
Webster's II New Riverside Dictionary (1984, 1988)	25
Webster's New World Dictionary (3d college ed. 1988)	19
Webster's New World Dictionary of American English (3d college ed. 1988, 1991)	19
Webster's Third New International Dictionary—Unabridged (1986)	25
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PETITIONER'S BRIEF ON THE MERITS

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Calfornia was entered on December 14, 1992, affirming petitioner's convictions of murder and attempted murder, and the sentence of death. *People v. Sandoval*, 4 Cal.4th 155 (1992). Joint Appendix 95, hereinafter "J.A." The Supreme Court denied a timely petition for rehearing on February 10, 1993. J.A. 150. On June 10, 1993, petitioner filed a petition for writ of certiorari, which this Court granted on September 28, 1993. J.A. 151. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

APPLICABLE CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property without due process of law.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

California Penal Code, section 1096:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything related to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

California Penal Code, section 1096a:

> In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given.

California Jury Instructions—Criminal, no. 2.90 (5th ed., West Publishing Co. 1988):

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Additional statutes and jury instructions from other states are set out in the appendices.

STATEMENT OF THE CASE

Petitioner Alfred Sandoval was charged in Los Angeles Superior Court on July 8, 1985 with two counts of murder and one count of attempted murder occurring on October 13, 1984, and two additional counts of murder occurring on October 31, 1984. J.A. 1. The prosecution sought the death penalty.

A jury was sworn to try the case on November 25, 1986, and the prosecution rested on December 22. The defense concluded its case on January 20, 1987, and, after argument, the jury was instructed on February 10, 1987, and began its deliberations regarding the following evidence. J.A. 97-102.

The October 13, 1984 shootings occurred in Belvedere Park in East Los Angeles, a predominantly Hispanic area with a history of violent gang warfare. Petitioner acknowledged that he shot three other Hispanic males at the park. The two decedents were shown by post-mortem blood analysis to be heavily intoxicated with PCP. Petitioner contended that the shootings occurred in self-defense, when the three victims, all affiliated with a local street gang, attacked petitioner and a cohort.

The October 31, 1984 counts related to the shooting of Ray and Marlene Wells in their home. Ray Wells was a local crime figure involved in drug dealing, stolen property, and other illegal activities. There were no eyewitness identifications of any perpetrator of the shooting, nor any physical evidence demonstrating petitioner's presence at the Wells home at the time of the offense.

The prosecution's principal inculpatory evidence consisted of bargained-for informer testimony regarding purported post-offense admissions by petitioner. Petitioner vigorously attacked the credibility of the prosecution's bargained-for witness and presented an affirmative alibi defense to these charges.

The jury began deliberations on February 10. J.A. 1. The jury returned guilty verdicts on the October 13, 1984 Belvedere Park counts on February 12, Clerk's Transcript, pp. 1495-1496; hereinafter "CT." However, the jury deliberated for another 11 days before returning guilty verdicts as to the Wells counts on February 23. J.A. 1.

Penalty trial began on March 2, 1987, the parties rested on March 12, and the jury deliberated from March 12 through March 18, at which time the jury declared an even split deadlock. J.A. 1. The court nonetheless directed deliberations to continue, after which the jury returned verdicts on March 19 of life without parole on counts I to III (relating to victims Aceves, Martinez, and Ray Wells) and a verdict of death on count IV (relating to victim Marlene Wells). J.A. 1.

The reasonable doubt instruction, given both at guilt phase to govern the jury's deliberations as to all counts, and at penalty phase with respect to the evidence of other criminal activity presented in aggravation by the prosecution, was as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that

> state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Reporter's Transcript, p. 5208; hereinafter "RT"; J.A. 49.

It is that instruction which petitioner challenges as diluting the prosecutor's burden of proof beneath constitutional standards and depriving him of due process and a fair jury trial.

SUMMARY OF ARGUMENT

The reasonable doubt instruction given in this case consists of a passage cloned from *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850). The crucial phrases "moral evidence" and "moral certainty" had very specific and clear meanings from the 17th century through the mid-19th century, consistent with the then-existing *and* with today's understanding of proof beyond a reasonable doubt. "Moral evidence" meant evidence from human sources as distinguished from mathematical evidence such as geometric proofs. "Moral certainty" meant the highest degree of certainty attainable regarding human affairs, as opposed to the absolute certainty of mathematics or logic.

However, the meanings of those key phrases have changed dramatically during the past 150 years, and have for some time been *in*consistent with contemporary constitutional conceptions of proof beyond a reasonable doubt. "Moral evidence" now connotes *non*-factual or *non*-evidentiary support for a proposition, and "moral certainty" has evolved into two additional meanings, one denoting a *lower* degree of certitude than proof beyond a reasonable doubt requires; and the second denoting an individual belief *not* necessarily based on evidence or facts, but on personal values or convictions. All federal circuits and the overwhelming majority of states have discarded the "moral certainty/moral evidence" language from their reasonable doubt jury instructions. Only Cali-

fornia, Idaho, Tennessee, North Dakota, and Massachusetts (whose Supreme Court launched the "moral certainty/moral evidence" verbiage in 1850) retain jury instructions which include that archaic and now affirmatively misleading language.

The instruction given in this case is not merely a jurisprudential dinosaur, easily recognized as an outdated irrelevancy and likely to be ignored by ordinary jurors. To the contrary, the phrases "moral evidence" and "moral certainty" have evolved contemporary meanings that, coupled with other defects in the instruction, are more than reasonably likely to frame jury deliberations in a way that undermines the constitutional standard of proof beyond a reasonable doubt.

ARGUMENT

I. THE CORE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT AND A SURVEY OF CONSTITUTIONALLY ADEQUATE EXPLANATIONS.

A. The Core Concept of Proof Beyond a Reasonable Doubt.

In 1970, this Court explicitly stated that the standard of proof beyond a reasonable doubt was an indispensable component of due process guarantees in all criminal proceedings. *In re Winship*, 397 U.S. 358, 364 (1970). That standard had been incorporated into American criminal jurisprudence during the course of the 19th century.[1] By the turn of the century, it was ubiquitous among state and federal jurisdictions. Although there has been considerable variation among descriptive and explanatory formulations in appellate courts and jury instructions, the core concept is straightforward. Proof beyond a reasonable doubt is proof which impels the trier of fact to "a subjective state of certitude of the facts in issue," so that the trier of fact is convinced of the de-

[1] Morano, "A Reexamination of the Development of the Reasonable Doubt Rule" (55 B.U.L. Rev. 507 (1975)).

fendant's guilt "with utmost certainty." *Winship*, 397 U.S. at 364. This Court has explained that to convict, jurors must reach "a state of near certitude," *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The "utmost certainly" referred to in *Winship* refers to the highest level of certainty attainable in the domain of human affairs, involving factual questions depending on *empirical* evidence, i.e., the level of certainty a notch shy of the absolute certainty available only in the domains of physics or mathematics.

This distinction between absolute certainty (*not* required in the legal system), and proof beyond a reasonable doubt (the penultimate degree of certainty which *is* required in criminal proceedings) has its origins in works of 17th century English philosophers, spearheaded by John Locke, who posited three types of knowledge: 1) that established by logical and deductive demonstrations, such as proofs in geometry, potentially yielding absolute certainty; 2) that based on testimony and second-hand reports of events, potentially yielding near but never absolute certainty; and 3) that based on immediate sensory experience of a phenomenon.[2] The second category, empirical knowledge based on reports of events in the real world, was obviously the type of knowledge used to make decisions in areas such as law, history, and certain areas of natural science, and was described in the phraseology of the 17th century as "moral evidence or moral knowledge," which had the possibility of leading to "moral certainty."[3]

[2] Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153 (1986). The Shapiro and Morano articles each provide an extensive review of the historical development of the legal standard of proof beyond a reasonable doubt and its philosophical underpinnings in the works of Locke, Wilkins, et al. See also Waldman, *Origins of Legal Doctrine of Reasonable Doubt*, 20 J. History of Ideas 299 (1959).

[3] The phrase, "moral certainty," was used in the writings of the English philosophers to designate the maximum degree of

Locke's contemporary, John Wilkins, described the highest state of moral certainty as a state of certitude that "though there be no natural necessity, that such things be so, and that they cannot possibly be otherwise . . . yet may they be so certain as not to admit of any reasonable doubt concerning them."[4] Wilkins' distinction between mathematical certainty on one hand and empirical or moral certainty on the other was incorporated as an illustration of the definition of "moral certainty" in early nineteenth century America.[5]

The legal standard of proof beyond a reasonable doubt, developed from the philosophical concepts of the seventeenth century, appeared in decisions of the English and American judiciaries in the late 1700s, and was adopted by the states during the 1800s with various verbal formulations.[6] An extended discussion of the reasonable doubt concept by Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. 295 (1850), provided the basis for the "moral evidence/moral certainty" jury instruction adopted during the latter half of the nineteenth century

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certainty attainable about human affairs. *See, e.g.*, Waldman, *op. cit.*, p. 304, quoting from Boyle, *Works*, vol. IV 182 (1772) ("the conclusions of a moral demonstration are the surest, that men aspire to, not only in the conduct of private men's affairs, but also in the government of states, and even of the greatest monarchies and empires . . . [and] may well amount to a moral certainty").

[4] Wilkins, *Of the Principles and Duties of Natural Religion* 7-8 (1675).

[5] Noah Webster, in *An American Dictionary of the English Language* (1828), defined "moral," inter alia, as follows:

> Supported by the evidence of reason or probability; founded on experience of the ordinary course of things; as *moral* certainty, distinguished from *physical* or *mathematical* certainty or demonstration. Wilkins—"Physical and mathematical certainty may be stiled [sic] infallible, and moral certainty may be properly stiled [sic] indubitable."

[6] See Morano, *supra*, at 519-524.

by several courts, including the Supreme Court of California in *People v. Strong*, 30 Cal. 151 (1866).[7]

Contemporary constitutional standards are essentially congruent with the core concept of proof beyond a reasonable doubt as articulated by Wilkins and others more than 300 years ago, and as explained in terms of moral evidence and moral certainty as those terms were *then* understood. The constitutional question arises from California's continuing use of the antiquated instruction, particularly the phrases "moral evidence" and "moral certainty," to explain reasonable doubt to contemporary juries. The original meaning of those phrases has been lost and the contemporary meanings are flatly inimical to the core concept of proof beyond a reasonable doubt.

B. Constitutionally Adequate Explanations of the Concept of Proof Beyond a Reasonable Doubt.

Judicial explanations of the concept of proof beyond a reasonable doubt must "convey the critical point that, while absolute certainty is unnecessary, a belief in guilt at least *approaching* absolute certainty *was* required." *Lanigan v. Maloney*, 853 F.2d 40, 47 (1st Cir. 1988) (emphasis in original). There are essentially two approaches to reasonable doubt definitions: definitions by adjective or synonym, and definitions by analogy or illustration. The former consists of parallel words or phrases whose ameliorative effect depends entirely on whether the purported synonyms and/or adjectives are in fact accurate renditions of the core concept *and* comprehensible to the ordinary juror. This Court has provided examples of appropriate synonyms, including the "utmost certainty" language of *Winship* and the "state of near certitude" language of *Jackson v. Virginia*, 443 U.S. at 315.

The instruction in this case also falls into this category, positing "moral certainty" as a synonym or proxy for "beyond a reasonable doubt." The value of exclusive

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[7] See Morano, *supra*, at 523.

reliance on this approach, and more specifically the utility of the "moral certainty" proxy, was questioned by commentators [8] and by this Court [9] even before the turn of the century.

In the second category of definition by analogy or illustration, this Court has also approved certain formulations, most notably that in *Hopt v. Utah*, 120 U.S. 430, 480 (1887), affirming the validity of the following instruction:

> The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless, from all the evidence, you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you then truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

This Court noted the value of illustration in explaining reasonable doubt to a jury:

> It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation, there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities.
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> * * * *
>
> . . . [I]t has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them. *But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclu-*

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[8] An influential article by May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 Am.L.Rev. 642 (1876), lambasted the interjection of the moral certainty language into the reasonable doubt instruction on the ground that it created more rather than less confusion, and is quoted with approval in Wigmore:

> The result of the evidence must be, says Mr. Starkie, a "moral certainty, to the exclusion of all reasonable doubt." Now, why perplex the administration of justice by interjecting this new element of uncertainty? Why not leave the courts and juries alone to grapple as best they may with the difficulty of determining, without any test, what constitutes a reasonable doubt, without adding to that difficulty the certainly equal difficulty of determining what constitutes a moral certainty? *What possible end can such a heaping up of indefinable terms serve, but to confuse and baffle rather than enlighten and aid the average juror?*

Wigmore on Evidence § 2497 at 410 (9th ed.) (emphasis supplied).

[9] In 1877, this Court questioned the use of moral certainty as a proxy for reasonable doubt in *Hopt v. Utah*, 120 U.S. 430, 440 (1887) (criticizing the "moral certainty" language from *Commonwealth v. Webster*—"the difficulty is that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt'; one may require explanation as much as the other").

> *sion, when an attempted definition might fail.* If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism, it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion. (Emphasis supplied.)

United States v. Holland, 348 U.S. 121 (1954) expressed continuing concern regarding judicial efforts to define reasonable doubt, and indicated that the illustrative explanation of reasonable doubt should be phrased in terms of "the kind of doubt that would make a person *hesitate* to act", *id.* at 140 (emphasis supplied), "rather than the kind on which he would be *willing* to act". *Id.*

The virtue of this approach is that it provides the average juror with a common-sense reference point. Resting on the assumption that serving on a jury and rendering a just verdict is one of the most important of a citizen's affairs, it provides the juror with a practical analogy by which to evaluate whether the prosecution's case compels the "subjective state of certitude of the facts in issue" required by *Winship*. 397 U.S. at 364.

The federal circuits which endorse an instruction explanning reasonable doubt generally follow the model that was approved by this Court in *Holland, supra*.[10]

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[10] The Third, Eighth, Tenth, and District of Columbia Circuits endorse pattern jury instructions of that nature. *Blatt v. United States*, 60 F.2d 481 (3d Cir. 1932); *Friedman v. United States*, [381] F.2d 155 (8th Cir. 1967); *United States v. Pepe*, 501 F.2d 1142 (10th Cir. 1974); *United States v. Merlos*, 984 F.2d 1239 (D.C. Cir. 1993). The Fourth and Seventh Circuits recommend against any explanatory instruction. *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988); *United States v. Hall*, 854 F.2d 1036 (7th Cir. 1988). The First, Second, Fifth, Sixth and Ninth Circuits leave the determination as to a definitional instruction to the district court's discretion. *United States v. Littlefield*, 840 F.2d 143 (1st Cir. 1988); *United States v. Ivie*, 700 F.2d 51, 69 (2d Cir. 1983); *Thompson v. Lynaugh*, 821 F.2d 1054 (5th Cir. 1987); *Whiteside v. Park*, 705 F.2d 869 (6th Cir. 1983); *United States v. Nolasco*, 926 F.2d 869 (9th Cir. 1991) (en banc).

Some jurisdictions include both simile and synonym in their definitions, *e.g., District of Columbia Criminal Jury Instructions* no. 2.09 (3d ed. 1978):

> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty. Rather, its burden is to establish guilt beyond a reasonable doubt.

That instruction was reaffirmed in *United States v. Merlos*, 984 F.2d 1239, 1241 (D.C. Cir. 1993) (finding constitutional error in a variation on the pattern jury instruction where the trial judge substituted the weaker phrase "strong belief" instead of the District of Columbia's phrase, "abiding conviction" or the Federal Judicial Center's phrase, "firmly convinced").

As the opinions of this Court and other federal courts indicate, there is a wide variety of formulations which

conveys accurate and accessible explanations of proof beyond a reasonable doubt. What they have in common is the concept of utmost certainty possible within the context of ordinary human affairs. *Hopt v. Utah, supra*; *Lanigan v. Maloney, supra.*

II. RECOGNIZED DEFECTS IN INSTRUCTIONS ON THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT.

Courts have been reviewing reasonable doubt instructions for more than a century, and certain defects have been identified. One instructional pitfall consists of *understating* the degree of *certainty* necessary to convict. For example, an instruction that proof beyond a reasonable doubt means a 51 percent chance that the prosecution's accusation is true would patently understate the standard of proof. This type of defect was identified as constitutional error in *United States v. Merlos*, 984 F.2d at 1241, where the trial judge substituted the weaker phrase "strong belief" in place of constitutionally adequate alternatives such as "abiding conviction" or "firm convict[ion] of the guilt of the accused. *Id.*

Another instructional defect consists of *overstating* the degree of *doubt* necessary to acquit. For example, an instruction that a reasonable doubt must be at least as large as the degree of doubt adults have about the existence of Santa Claus or extraterrestrials patently overstates the size of doubt necessary to acquit. This type of defect was identified in *Cage v. Louisiana*, 498 U.S. 39 (1991) by the use of the phrases "substantial doubt" and "grave uncertainty" as purported synonyms for reasonable doubt.

A third instructional defects invites jurors to reach the degree of certainty necessary to convict (regardless of whether correctly stated) based on factors *independent* of, or even *regardless* of, the evidence in the case. This type of defect has been identified primarily in instructions using the "moral certainty" language, which invites the jury to include moral and/or emotional responses to the

defendant and the crime in its deliberations, in derogation of all objective evaluation of the prosecution's evidence. *See State v. Bryant*, 432 S.E.2d 291, 297 (N.C. 1993): "A [moral certainty] jury instruction which emphasizes what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent with the role of the jury in deciding the guilt or innocence of the defendant."; *Perez v. Irwin*, 963 F.2d 499 (2d Cir. 1992) ["the concern is that the use of the words [moral certainty] might lead a jury to reach a verdict based on feelings rather than on the facts of the case"]; *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993), [moral certainty language defective because of concern that juries might feel justified in convicting based on emotion rather than factual evidence]. This type of instructional defect invites the jury to base its decision on feelings rather than facts, on emotions rather than evidence, to the detriment of an accused.

Cage v. Louisiana, 498 U.S. at 41, referred to "moral certainty" language as one of the grounds for finding the challenged instruction unconstitutional. As *Morley v. Stenberg*, *supra*, subsequently pointed out, this reference reflects this Court's concern for either or both defects of understating the degree of certainty necessary to convict, and deflecting the jury from evidence to feelings and emotions. Petitioner now turns to a discussion of the defects of the instruction given in this case, after which petitioner will show that this instruction, viewed in its entirety, is more defective than the instruction in *Cage* in each of these respects.

III. THE CONSTITUTIONAL DEFECTS IN THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE.

Petitioner's jury was instructed as follows:

> Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is

> open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." J.A. 49.

This definition, consisting of a passage extracted from the larger discussion of reasonable doubt in *Commonwealth v. Webster, supra,* contains each of the three types of defects identified above.[11]

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[11] The following is the entire passage in *Webster* which includes the instructional segment given in this case, as indicated by the shaded portions:

> Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delecti*, as it is termed, or the offence committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.
>
> Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved by. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Commonwealth v. Webster, 59 Mass. at 119-120.

A. The Instruction Understated the Constitutionally Required Degree of Certainty.

The degree of certainty required of jurors is entirely contingent on their understanding of the meaning of the phrase "moral certainty" in the jury instruction. The instruction, awkwardly phrased in the negative, defines reasonable doubt as "the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." By necessary implication, proof beyond a reasonable doubt would be a condition in the minds of jurors that they *can* say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[12]

The phrase "abiding conviction" in this context is clearly modified by the phrase "to a moral certainty," which sets the standard of certitude. In this grammatical construction, the phrase "abiding conviction" does not have any independent effect in conveying a standard of proof. Rather, it simply indicates that the trier of fact must be very sure that the standard of proof, otherwise defined, has been met. For example, a procedural rule could permit a magistrate to bind a defendant over to stand trial only upon an abiding conviction that there was a *reasonable suspicion* that the defendant had committed the crime; a similar rule could permit a jury to find a defend-

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[12] The discussion in *Webster* quoted above, from which the California instruction has been extracted, contained an explicit and extensive affirmative description of proof beyond a reasonable doubt, wholly lacking in the California excerpt.

ant not guilty by reason of insanity only upon an abiding conviction that the defendant has demonstrated insanity by a *preponderance of the evidence*. In this usage, the phrase "abiding conviction" does not set the standard of proof, but rather emphasizes that the standard of proof must be met.[13]

The question becomes one of determining what level of certitude jurors would likely understand by the phrase "to a moral certainty." To this end, petitioner has begun with a review of available dictionaries, several of which define the phrase "moral certainty" in the course of listing the various meanings of the single word "moral." This inquiry reveals that the phrase "moral certainty" has accumulated multiple meanings in contemporary usage. A primary meaning, clearly *in*consistent with the concept of proof beyond a reasonable doubt, defines "moral certainty" in terms of a "probability," and specifically contrasted to something being "proven." For example, the *Longman Dictionary of the English Language* (1984) definition is "very probable though *not* proved; virtual (*a moral certainty*)." *Id.* at 951, col. 2. *Chambers 20th Century Dictionary* (1983) defines moral certainty as "a likelihood great enough to be acted on, although not capable of being certainly proved." *Id.* at 820, col. 2. *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) defines "moral certainty" as "probable though not proved;

[13] In a more colloquial context, police officers from time to time entertain or express an "abiding conviction," in the *absence* of presently available evidence, that a certain individual, ostensibly blameless, is in fact a behind-the-scenes criminal mastermind, and set themselves the task of investigating and obtaining objective evidence. Indeed, this scenario has provided the dramatic gist for innumerable television detective shows, such as *The Untouchables*, in which the plot consists of law enforcement efforts to pierce the veil of legitimacy assumed by a crafty individual, whom the police are convinced is an arch-criminal, and obtain sufficient evidence for a prosecution. The point is that an "abiding conviction" of wrongdoing is in no way a necessary proxy for proof beyond a reasonable doubt.

virtual." *Id.* at 756, col. 2. *Webster's New World Dictionary of American English* (3d college ed. 1988, 1991) defines "moral certainty" as "[b]ased on strong probability." The 1988 edition of *Webster's New World Dictionary* (3d college ed. 1988) also defines moral certainty as "based on strong probability." *Id.* at 882, col. 2. The *Random House Webster's School & Office Dictionary* (1993) includes the definition "based on strong probability: *a moral certainty.*" *Id.* at 294, col. 2. The *Random House Dictionary of the English Language* (3d ed. 1987) includes the definitions "resting upon convincing grounds of probability; virtual: a moral certainty." The *Collins English Dictionary* (3d ed.) includes among the meanings of "moral" the phrase "having a strong probability: a moral certainty." The *Shorter Oxford English Dictionary on Historical Principles* (1992) defines "moral" as "[u]sed to designate that kind of probable evidence which rests on a knowledge of character and of the general tendencies of human nature; often more loosely applied to all evidence which is merely probable."

The clear import of these definitions is that the phrase "moral certainty" in contemporary parlance means a level of certainty distinctly *below* that required by proof beyond a reasonable doubt. To the extent "moral certainty" is currently understood as denoting only the probability or even a strong probability of a fact, it is *in*consistent with the requirement of "utmost certainty" enunciated in *Winship, supra,* and instead conveys a meaning far more consistent with the legal concept of "preponderance of the evidence," or at most "clear and convincing evidence."[14]

[14] To demonstrate how far contemporary usage of the "moral certainty" terminology has departed from the original conception of this terminology, it is instructive to note that *Black's Law Dictionary* (6th ed.) faithfully retains the 19th century meaning:

> That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of the fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability

Recent cases condemning jury instructions which include "moral certainty" language have relied on these current dictionary definitions in reaching their results. For example, *State v. Bryant,* 432 S.E.2d 291 granted a new trial because of a constitutional invalid reasonable doubt instruction predicated on a standard of "moral certainty":

> We believe the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* is "moral certainty." The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty.
>
> A moral certainty may exist when a thing is "probable though not proved." *Webster's Ninth Collegiate Dictionary* 771 (9th ed. 1991). A moral certainty may exist when something is "based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration." *The American Heritage Dictionary* 852 (1979). 432 S.E.2d at 297.

Even prior to this Court's identification of the moral certainty language as a defective component of the Louisiana instruction, federal cases were generally consistent in condemning the moral certainty language as a component of a reasonable doubt instruction. *See, e.g., Perez v. Irwin, supra,* ["the concern is that the use of the words (moral certainty) might lead a jury to reach a verdict based on feelings rather than on the facts of the case"]; *Lanigan v. Maloney,* 853 F.2d 40, 47 (1st Cir. 1988); *United States v. Del Toro Soto,* 676 F.2d 13, 17 (1st Cir. 1982); *State v. Manning,* 409 S.E.2d 372 (S.C. 1991) [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction]; *People v. Hewlett,* 519 N.Y.S.2d 555

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sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established beyond a reasonable doubt. (*Gray v. State,* 56 Okl. Cr. 208, 38 P.2d 967.)

(App.Div. 1987) [reversible error in defining reasonable doubt in terms of "moral certainty" and "reasonable degree of certainty"]. *See also People of Territory of Guam v. Yang,* 800 F.2d 945, 952 (9th Cir. 1986) [indicating that the Ninth Circuit is "strongly . . . inclined to side with those jurisdictions that reject the 'moral certainty' language"].

B. The Instruction Overstated the Degree of Doubt Necessary to Acquit.

By an array of negatives as to what reasonable doubt is *not,* the instruction given in this case incorrectly informs the jury that reasonable doubt is some larger, more concrete, or more identifiable factor than is constitutionally permissible. The instruction reads that reasonable doubt "is not a mere possible doubt." The fact that the instruction is phrased in the negative does not in any way insulate it from the *Cage* analysis, which condemned an instruction containing affirmative overstatements of the quantum of doubt necessary to acquit, i.e., substantial doubt or grave certainty. Presumably the result in *Cage* would have been the same if the instruction had been framed in the negative, e.g., "reasonable doubt is not a doubt falling short of substantial, nor is it an uncertainty less than grave."

The defect in the "possible doubt" formulation in this case is that by its very nature, all doubt is necessarily "possible" rather than "actual" or "probable." Reasonable doubt in the legal context is intended to convey the *possibility* that the accused is not guilty despite substantial proof. If the jury is instructed in effect that reasonable doubt is *more* than the possibility of error in the prosecution's assertion of the guilt of the accused, the jury has been misled and the degree of doubt has been overstated.

The likelihood of juror misunderstanding is increased by the instruction's assertion that "everything . . . is subject to possible or imaginary doubt." The problem here is that the phrase "imaginary doubt" is juxtaposed to

"possible doubt" and suggests a scale of doubt ranging from non-existent at one pole, through imaginary, down to "possible," and continuing on to actual or substantial doubt, eventually reaching an alternative endpoint of complete doubt or disbelief. The constitutional problem is that if a jury is told that reasonable doubt is not a "mere possible doubt," but by implication must be something greater, then the jury is all too likely to understand the magnitude of a reasonable doubt necessary to acquit as the functional equivalent of "an actual substantial doubt" or a "grave uncertainty." [15]

For these reasons, the phrase "not . . . [a] possible doubt" has been recently and roundly condemned as a component of a reasonable doubt jury instruction in *State v. Chavarria*, —— P.2d ——, 93 Westlaw, 313170 (Ariz.App. 1993), which found error in the Recommended Arizona Jury Instruction ("RAJI") regarding reasonable doubt.[16] The offending phrase instructed that reasonable doubt "does not mean an imaginary or possible doubt":

[15] Given that the phrase "substantial doubt" overstates the degree of doubt necessary to acquit, then the phrase "possible doubt" should be viewed as more *correctly* characterizing the proper constitutional concept. The instruction condemned in *Cage* specifically juxtaposed the two phrases as alternative formulations of the same idea: "A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt." 498 U.S. at 40.

It turns out under this Court's jurisprudence that Louisiana had it wrong, i.e., that reasonable doubt is not so large as an "actual substantial doubt." The "possible doubt" phrasing, obviously intended by the instruction to convey a slightly lower quantum of doubt than "substantial doubt," would thus be a more correct formulation after all.

[16] The full instruction reads as follows:

> The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent. The State must prove the defendant guilty beyond a reasonable doubt. This means the State must prove each element of the charge beyond a reasonable doubt. The term reasonable doubt means doubt based upon reason. *This does not mean an imaginary or possible doubt.* It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence. (Emphasis supplied.)

> [T]he RAJI optional definition, in our opinion, not only adds 'nothing helpful to the phrase' [citing *Wigmore on Evidence*, § 2497 at 408-409 (Chadbourn rev. 1981)], but has the affirmative potential to confuse. Though it suggests that a 'possible doubt' is insufficient to amount to a 'reasonable doubt,' the meaning of 'possible doubt' is elusive in itself. One juror might regard a possible doubt as a passing notion that fails to blossom into doubt. *But another might seize on the element of possibility and conclude that any doubt that fails to rise to the level of probability does not qualify as a reason to acquit.* 93 Westlaw 313170:3; emphasis supplied.

Chavarria then referred to the discussion of the defects in the "possible doubt" phrase in *People v. Brigham*, 25 Cal.3d 283, 296 (1979) (Mosk, J., concurring), and concluded that "the counterposition of possible and reasonable doubts in the RAJI optional instruction might lead juries to exclude appropriate possibilities from their deliberations," requiring "that it should be abandoned from any future use," 93 Westlaw 313170:4.[17] *See also*

[17] Justice Mosk of the California Supreme Court, concurring in *People v. Brigham*, 25 Cal.3d at 296, similarly criticized the use of the phrase:

> Finally, even if the archaic phrase "moral evidence" were omitted, the first sentence of the definition of reasonable doubt would remain essentially ambiguous. Its message to the jury is that reasonable doubt is not a "possible" doubt. Whether this statement helps or hinders, however, depends entirely on how each juror understands the key word "possible." Unfortunately the word has many meanings, and the instruction does not define it. If the juror were to take it in the sense of "potential"—as opposed to "actual"—the statement would perhaps be intelligible. But that is not the primary meaning of "possible"; much more commonly it simply denotes that which can be or can become—as opposed to "impossible." Yet if it is so understood, the instruction again mystifies the juror: it begins by informing him he must vote to acquit if he has a

State v. Williams, 828 P.2d 1006, 1019 (Ore. 1992) ("the phrase 'open to some possible or imaginary doubt' is not instructive, and we discourage its use").

In sum, the fundamental flaw in this aspect of the reasonable doubt instruction given in this case is that the essence of reasonable doubt is the contemplation of alternate possibilities, *not* probabilities or certainties. The commonsense and current usage strongly implies that if a jury understands that the degree of doubt necessary to acquit must be greater than a possibility, it must be a *probability* of innocence, i.e. an overstatement of the degree of doubt necessary to acquit just as *Cage* condemned. This is an unconstitutional formulation, and it is particularly prejudicial in the California instruction because it reinforces the *under*statement of the degree of certainty necessary to convict, tied as it is to "moral certainty."

C. The Instruction Invited the Jury to Supplant the Objective Evaluation of the Prosecution's Evidence With Improper Reliance on Moral Considerations and Personal Predilections.

1. *The "moral certainty" problem.*

Several of the cases discussed by petitioner above recognize that the inclusion of the term "moral certainty" in a reasonable doubt jury instruction invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence. *Morley v. Stenberg, supra*; *Perez v. Irwin, supra.*

Petitioner believes that these cases, critical as they are of the "moral certainty" language, nonetheless *understate* the harmful effect of tying proof beyond a reasonable doubt to the phrase "moral certainty," particularly when combined with the reference to "moral evidence."

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reasonable doubt, then it tells him that such a doubt is not possible. "Thus not only is it not helpful to distinguish '*possible* doubt' from '*reasonable* doubt,' it is downright confusing." (Sinetar, *supra*, at p. 554.)

The phrase "moral certainty" has acquired an additional meaning, apart from the mere "probability" definition noted. A cluster of current dictionary definitions define "moral certainty" as a strong personal belief in a particular fact or idea in the *absence* of or *regardless* of objective evidence. For example, *Webster's Third New International Dictionary—Unabridged* (1986) defines "moral certainty" as "based on an inner conviction"; and "virtual rather than actual, immediate, or completely demonstrable." *Id.* at 1468, col. 3. The *American Heritage Dictionary of the English Language* (3d ed. 1993) includes the following definition: "Based on a firm conviction, rather than on the actual evidence: *a moral certainty.*" *Id.* at 1173, col. 2. The *American Heritage Dictionary, Second College Edition* (1985) has: "Based upon strong likelihood or firm conviction, rather than upon the actual evidence: *a moral certainty.*" *Id.* at 814, col. 1. The *American Heritage College Dictionary* (3d ed. 1993) contains this definition of "moral," without the further reference to moral certainty: "Based on strong likelihood or firm conviction, rather than on the actual evidence." *Id.* at 886, col. 2. And the *American Heritage Dictionary of the English Language* (1981): "Based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration: *a moral certainty.*" *Id.* at 852, col. 2. *Webster's II New Riverside Dictionary* (1984, 1988) also defines "moral certainty" as "[b]ased on strong likelihood of conviction rather than on solid evidence." *Id.* at 769, col. 1. *A Dictionary of American-English Usage* (1957) notes that "*moral certainty* is always applied to what is in fact an uncertainty. Though this peculiar sense of *practical* or *virtual* in combination with *certainty* is hard to account for, it is established as idiomatic." *Id.* at 350, col. 1-2.[18]

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[18] It appears that among the array of available dictionaries, only the historically-oriented Oxford series, with its emphasis on historical meanings, retains a definition consistent with the concept of proof beyond a reasonable doubt. This series of diction-

In addition to dictionary definitions, the actual usage of a word or phrase in ordinary discourse also indicates its currently understood meaning. One use of the moral certainty phrase perhaps most familiar to this Court occurred in *In re Grand Jury Witness Margaret Heutsche*, 414 U.S. 898 (1973) (Douglas, J., dissenting from denial of certiorari), in which Justice Douglas made the following statements regarding the pervasiveness of wire tapping in the course of his analysis: "We who live in the District of Columbia know that electronic surveillance is commonplace. *I am indeed morally certain that the Conference Room of this Court has been 'bugged'*; and President Johnson during his term in the White House asserted to me that even his phone was tapped." *Id.* (emphasis supplied.)

While Justice Douglas did not fully explain what he meant by the phrase "morally certain," it is eminently

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aries is of course dedicated to preserving historical meanings, regardless of current usage. The historical emphasis of the Oxford series is described, inter alia, in Landau, *Dictionaries: The Art and Craft of Lexicography* (1984), noting that "[t]he OED . . . provides a historical record of the development and meaning of each word" (71). For example, the *Oxford English Dictionary* (2d ed. 1989) describes the term "moral certainty" as "slang" chiefly used in Australia, *id.* at vol. IX, 1068, col. 1, and defines the term as:

> Used to designate that kind of probable evidence that rests on a knowledge of the general tendencies of human nature, or of the character of particular individuals or classes of men; often in looser use, applied to all evidence which is merely probable and not demonstrative. *moral certainty*: a practical certainty resulting from moral evidence; a degree of probability so great as to admit of no reasonable doubt. *Id.* at vol. IX, 1070, col. 1.

The *Concise Oxford Dictionary* (1990), 770, col. 1, defines moral certainty as a "probability so great as to allow no reasonable doubt." The *Oxford American Dictionary* (1980) defines moral certainty as "a probability so great that no reasonable doubt is possible." *Id.* at 432, col. 1. The *Cassell Paperback English Dictionary* (1990) defines moral certainty as a "probability that leaves little doubt." *Id.* at 868, col. 1.

apparent that he was *not* saying that he knew of proof beyond a reasonable doubt that the conference room of this Court had been bugged. If the reader substitutes the phrase "I believe with the utmost certainty based on the strength of the evidence" for "morally certain," the resultant meaning obviously differs from that intended by Justice Douglas. The original sentence clearly conveys the meaning that Justice Douglas firmly believed that the conference room had been bugged, based *not* on specific evidentiary support, but rather on his personal conviction about the likely conduct of others, in this case law enforcement agencies. It is this meaning of "moral certainty" which has gained substantial currency in contemporary American usage during the last 25 years, but which is anathema to the constitutional requirement that a jury convict only on the basis of *evidentiary* certainty.[19]

As an additional demonstration of the current meaning of "moral certainty" in popular discourse, petitioner has selected representative examples of the use of the phrase "moral certainty" in the press during the past ten years.[20] For example, an op/ed piece by Meg Greenfield in the Washington Post of March 20, 1985, entitled "Why We're Still Muckraking," reflected on the skepticism of an investigative journalist to take anything at face value, even if there is no identifiable indication of an underlying problem—"we are morally certain that if we just yank open one more closet door the corpse will fall out." This

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[19] The accompanying phrase "abiding conviction" is wholly redundant when connected with "moral certainty." As set forth below, the latter has come to connote a personal commitment to a position to the point of obstinacy to a particular position regardless of the facts.

[20] Reference to current usage as reflected in newspapers has been employed by this Court as an aid to discerning what meaning jurors would likely glean from a phrase. See *Arave v. Creech*, —— U.S. ——, 123 L.Ed.2d 188, 206 (1993) (Blackmun, J., dissenting).

usage parallels that of Justice Douglas above, and emphasizes the notion of a personal and individual conviction based not at all on evidentiary support.

The phrase is commonly used in descriptions of partisan positions taken in struggles over abortion-related issues. For example, the Atlanta Constitution of Sunday, July 9, 1989 carried an editorial by Harrison Hickman which commented that the pro-life legislators "must show how they would reconcile their moral certainty with the behavioral reality of the 1990s." If the reader substitutes as a possible synonym for "moral certainty" the phrase "utmost certainty based on the strength of evidence," the sentence makes no sense. If, on the other hand, the reader substitutes a phrase such as "strong conviction based on personal values," the sentence clearly retains its original meaning. Similarly, the Richmond Times-Dispatch of August 27, 1993, in an editorial article entitled *Abortion Violence*, criticized a Florida priest who attempted to characterize the shooting of abortion doctors as "justifiable homicide"—"that is the voice of individuals for whom moral certainty has shaded into fanaticism, defined as the belief that the end justifies the means." Again, petitioner suggests that the reader alternately substitute the two phrases "utmost certainty based on the strength of evidence" and "strong conviction based on personal values" for the phrase "moral certainty," and decide which expresses the intended meaning of the sentence.

The same exercise yields similar results in the context of many instances of current uses of the "moral certainty" phrase. An article by John Allemang in the Atlanta Constitution of July 21, 1991 described the polarization of American society in terms of moral certainty—"the uncompromising tone of moral certainty is clear. Social justice becomes rough justice." The clear implication is that individuals or groups driven by moral certainty act according to their general values, not in accordance with a case-by-case approach.

Similarly, an article in the San Francisco Examiner of July 14, 1993 regarding the picketing of an abortion clinic in San Jose characterized the implacable attitudes on both sides as follows—"with unflagging determination throughout the long hot day, the two sides held their bitter ground, sustained by moral certainty and shielded by several coats of sunscreen." Other examples include the editorial entitled *America's Loss of Respect* in the January 25, 1992 edition of the Sacramento Bee, lamenting a lack of moral certainty in American international leadership, and contrasting this with the success enjoyed by Winston Churchill during World War II—"Churchill's speeches, morally certain, impregnated with the imagery of justice and patriotism, were his most powerful wartime instrument." Another Sacramento Bee editorial of January 24, 1990, lamented that a Jewish refugee from the Soviet Union, having immigrated to Israel, had his leadership capacity blunted by the complexities of Israeli politics—"As [Sharansky] spoke and answered questions at his talk at the University of California, Davis, last week, the moral certainty that made his example so luminous as a refusenik seemed never to move out of the stultifying shadow of Yitzhak Shamir." The phrase "moral certainty" in both uses clearly refers to personal conviction and inner strength rather than objective certainty arising from extrinsic evidence.[21] These examples of recent uses

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[21] Virtually the *only* instances in which the phrase "moral certainty" is used in published sources with a meaning consistent with the concept of proof beyond a reasonable doubt are those where a judge or lawyer is quoted using the phrase as a term of art. For example, Mary Sue Terry, Democratic candidate for governor of Virginia, was quoted in the May 13, 1993 Richmond Times-Dispatch that during her years as Attorney General she never "blindly" advocated to support a death sentence—"I would always satisfy myself beyond a reasonable doubt, and to a moral certainty, that the person had a fair trial and was guilty of the crime". Page B-5. Similarly, a Los Angeles Superior Court judge was quoted in the March 5, 1992 Los Angeles Times as declining to find a litigant in contempt for violation of a court order because "he couldn't find to a moral certainty that [the litigant] was not

confirm the case law that the phrase "moral certainty" means "based on feeling . . . rather than fact," *United States v. Indorato*, 628 F.2d 711, 721, n. 8 (1st Cir. 1980), and based "upon a subjective feeling rather than upon an evaluation of the evidence," *State v. Manning*, 409 S.E.2d 372 (S.C. 1991).

2. *The "moral evidence" problem.*

Nor does "moral evidence" currently mean what it did during the eighteenth and nineteenth centuries, when it signified empirical proof of matters relating to human affairs. Rather, it presently connotes matters relating to the ethics or morality of a particular situation, rather than the objective, verifiable facts comprising the situation. While the phrase does not have widespread use in print,[22] instances where it does appear highlight the contrast in meaning to factual or objective evidence. *See, e.g.*, Los Angeles Times, December 24, 1990, Metro section at 8, in which a citizen complains of actions by the Board of Supervisors—"[The supervisors'] brazen act ramming this sordid business through, despite all the factual and moral evidence against it, turns my stomach."

Similarly, in an editorial in the May 1, 1986 Miami Herald entitled *Waldheim: The Moral Evidence Is Overwhelming*, the writer described the efforts of Austrian politican Kurt Waldheim to run for elective office, in spite of the widespread belief that he collaborated with Nazis in war crimes during World War II. The writer

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telling the truth" regarding an apparent violation. Southeast section at 4.

The discontinuity between the usage of the phrase by members of the legal profession and that of the public at large suggests the strong probability that neither group appreciates the meaning of the language as understood by the other, and that the very words which law-trained persons hear as *reiterating* the venerable expression of an exacting burden of proof are heard by jurors as *diluting* that burden.

[22] The phrase "moral evidence" seldom appears in dictionaries; one exception is the *Collins English Dictionary* (3d. ed.)—"based on knowledge of the tendencies of human nature."

noted that the current "president of Austria, a former jurist, has seen some of the evidence against Waldheim and said he finds it insufficient for prosecution," causing the writer to conclude, "legally, there will never be a case against Waldheim," but "the moral evidence is overwhelming."

In fact, the phrase "moral evidence" evokes a notion very close to "character evidence," barred by state and federal evidentiary rules from use by the prosecution to paint a picture of a criminal lifestyle or background as proof of a particular criminal act charged. Unfortunately, the California jury instruction with its imprimatur on the consideration of "moral evidence" invites the jury to do just what the Evidence Code and due process guarantees forbid. The prosecutor took full advantage of this opening in this case, branding petitioner in argument as a "heathen." RT 5619. Where, as in California, the jury is specifically told that its decision may be based on the consideration of "moral evidence" and all that they need to convict is a "moral certainty," a defendant such as petitioner faces an unacceptably high likelihood of an unfair and unconstitutional verdict.

Use of "moral evidence" language in reasonable doubt instructions has come in for increasing judicial criticism. Justice Mosk, concurring and dissenting in *People v. Brigham*, 25 Cal.3d at 295, observed that "[t]he most serious pitfall [in CALJIC 2.90] is the phrase 'moral evidence,'" finding it confusing to contemporary jurors. Similarly, the Oregon Supreme Court recently disavowed the moral evidence language in its former instruction—"We agree that the phrase 'moral evidence' is archaic and obscure, and we disapprove of its use," *State v. Williams*, 828 P.2d 1006, 1019 (Ore. 1992). In fact, the phrase is archaic, but has evolved into a current meaning at odds with its meaning when originally incorporated into reasonable doubt instructions.[23]

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[23] Finally, the shift of focus from evidence to emotions, from facts to feelings, caused by the repeated use of the modifier "moral"

IV. PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE DEFECTIVE REASONABLE DOUBT INSTRUCTION.

A. The Test for Determining Whether Jury Instructions Violate Constitutional Rights.

The test for determining constitutional error from a defective jury instruction is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. ——, 116 L.Ed. 2d 385, 399 (1991), quoting from *Boyde v. California*, 494 U.S. 370, 380 (1990). *Boyde* explained that to meet this test, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." 494 U.S. at 380. The "reasonable likelihood" standard was chosen to make clear that appellate reversal is not required when "there is only a possibility of such an inhibition". *Id.* The necessary showing is greater than a *possibility* but less than an actual *probability*; when a guilty verdict appears with competing likelihood to rest either on a "proper basis" or on "an unconstitutional ground," this Court "decline[s] to choose between two such likely possibilities." *Id.*, quoting from *Bachellar v. Maryland*, 397 U.S. 564 (1970).

In this analysis, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 116 L.Ed. 2d at 399, quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The factors to be considered include the challenged instruction itself, "the instructions as a whole," *McGuire* at 399;

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is compounded by the current connotations of the primary verb "feel" in the instruction, i.e., whether jurors "feel an abiding conviction to a moral certainty." In this era of pervasive self-awareness and self-improvement programs, people are encouraged, if not entitled, to express their feelings, and to rely on their feelings, with diminished accountability to objective facts, nowhere more so than in California. The verb "feel" would be very unlikely to appear in a jury instruction drafted today.

the "trial record," *id.*; the closeness of the evidence, *McGuire* at 404 (O'Connor, J., concurring and dissenting); the arguments of counsel, *Boyde* at 384-385; and the length of jury deliberations, *McGuire* at 403-404 (O'Connor, J., concurring and dissenting).

Moreover, it is eminently apparent from this Court's decision in *Sullivan v. Louisiana*, —— U.S. ——, 124 L.Ed.2d 182, 199 (1993) that some instructional errors pose a far more serious threat to the integrity of the proceedings than others. Where, as here, the challenged instruction threatens to undermine the fundamental guarantees of both due process and a jury trial, *Sullivan* at 198, the determination of what is a reasonable likelihood that the instruction was applied in an unconstitutional manner must take account of the gravity of this risk. For all of the reasons persuasively stated in *Sullivan*, a jury verdict following a misleading instruction on the standard of proof beyond a reasonable doubt cannot be salvaged by appellate weighing of the evidence presented to the jury. Rather, the focus of inquiry regarding a dubious reasonable doubt instruction must be more its likely impact on the jury's deliberations than the strength or weakness of the evidence that the jury was deliberating about. If a textual analysis of the challenged instruction demonstrates a reasonable likelihood that the jury misunderstood the concept of proof beyond a reasonable doubt, as it did in *Cage*, then further analysis is improvident—"There is no *object*, so to speak, upon which harmless error scrutiny can operate." *Sullivan* at 190 (emphasis in original). Only if such textual analysis does not establish the requisite reasonable likelihood is resort to the remaining tools of the *Boyde/McGuire* analysis necessary.

In sum, review of a constitutionally challenged jury instruction must consider both how likely it is that the jury was misled *and* how serious are the consequences of the jury being misled in terms of the fundamental fairness of the proceedings. In light of this Court's uncom-

promising stand regarding harmless error analysis in *Sullivan*, review of the challenged instruction in this case must reflect the unique importance of the reasonable doubt instruction in assuring a fair trial.[24]

B. Application of the Test to This Case.

1. *The likelihood of misapplication as indicated by textual analysis.*

a. *The manifest defects in the instruction.*

As set forth in part III, the California instruction contains a unique combination of mutually compounding defects which understate the necessary degree of certainty for conviction, overstate the degree of doubt necessary to acquit, and invite the jury to rely on impermissible matters of moral disapprobation and individual feelings apart from the evidence in reaching a verdict. The instruction consists of a passage extracted from *Commonwealth v. Webster*, each component of which conveys an improper meaning to the jury in current parlance. While the passage—at the time it was penned—conveyed a meaning consistent with the core concept of proof beyond a reasonable doubt,[25] the meaning presently conveyed is a gross deviation from that core concept.[26] Given the

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[24] It appears that this Court made just such a calibration in *Cage*, determining "how reasonable jurors could have understood the charge as a whole," 498 U.S. at 41, even though *Boyde v. California* had previously established the "reasonable likelihood" of misapplication standard for review of instructional error generally, 494 U.S. at 380.

[25] See Shapiro, *supra*, at 192.

[26] Shapiro at 193—"there is little doubt that 'moral certainty' no longer conveys these . . . ideas." Professor Shapiro suggested a possible (and by no means prescriptive) version of the *Webster* charge rendered in current idiomatic English:

> We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean you should not find the defendant guilty unless you have reached the highest level of certainty of the defendant's guilt that is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom. *Id.*

It would defy common sense to assert that the instruction given in this case conveys even a remote approximation of this core concept.

contemporary lexicography of the phrase "moral certainty," the current uses of "moral certainty" and "moral evidence," and the other compounding aspects of the instruction, it is more than reasonably likely that the jury understood the instruction as setting the degree of certainty necessary to convict at the level of probability rather than utmost certainty, and as inviting the jury to rely upon its moral response to petitioner and his conduct in reaching that degree of certainty.

b. *The absence of countervailing or corrective language.*

The instruction in this case consists primarily if not solely of defective components; it is not as if the challenged portions are merely intermittent sour notes in an otherwise harmonious rendition of the reasonable doubt concept. Petitioner juxtaposes the instruction in this case to both the original reasonable doubt discussion in *Webster* and the reasonable doubt instruction in *Cage* to emphasize that the instruction here lacks any of the redeeming features found in both of those.

The *Webster* discussion contains clear language, not in the instruction here, *prohibiting* conviction if the evidence shows only a strong probability of guilt, and instead requiring stronger proof:

> For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be

> true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty . . . . *Commonwealth v. Webster*, 59 Mass. at 119-120.

That language clearly informs the jury that the requisite degree of certainty is *higher* than a strong probability. The instruction condemned in *Cage* had a similar passage —"[e]ven where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused," 498 U.S. at 40. In contrast, the only guidance in the instruction here is the moral certainty language, which presently conveys the notion only of a probability, *not* the higher degree of certainty conveyed in *Webster* and *Cage*. If the instruction here contained language similar to that in *Webster* and *Cage*, it might have at least neutralized the mere probability meaning of moral certainty in contemporary parlance, but the instruction lacks any such corrective.

Next, the instruction condemned in *Cage* also contains language bracketing the reasonable doubt standard from the other direction. After negating *probability* as a basis for conviction, the *Cage* instruction continued—"What is required is not an absolute or mathematical certainty, but a moral certainty." 498 U.S. at 40. That language suggests to a jury that proof beyond a reasonable doubt requires a degree of certainty residing somewhere between probability and complete certainty, a better bracketing of the core concept of "utmost certainty" than can be gleaned from any plausible reading of the instruction in the present case.[27] The instruction here has no potentially redeeming

[27] Other instructions have been found constitutionally defective even though containing ameliorative aspects absent from the instruction here, e.g., *Morley v. Stenberg*, 828 F. Supp. at 1424, noting that "portions of the challenged instruction are unobjectionable," and referring to the *Holland* "hesitate to act" language and the contrast of proof beyond a reasonable doubt with "absolute or mathematical certainty."

language, and reduces itself to primary reliance on the phrase "moral certainty," accompanied by other misleading and diluting phraseology such as the use of "moral evidence" and the use of the untethered verb "feel" rather than a more anchored verb, e.g., "believe" or "are convinced."

2. *The likelihood of misapplication as indicated by the record as a whole.*

The multiple defects in the instruction here were particularly likely to result in a deviation from the reasonable doubt standard in light of the record as a whole. As set forth above, the tools of analysis require reference to matters including the closeness of the case, the arguments of counsel, and the length of jury deliberations.

Viewing the case as a whole, the prosecution presented strong evidence of petitioner's involvement in the October 13 Belvedere Park shootings (although the degree of culpability was vigorously contested), and weak evidence of petitioner's involvement in the October 31 Wells shootings.[28] It took the jury two days to return a verdict on the Belvedere Park case. Once the jury had found petitioner guilty as to those counts, they turned their attention to the much more difficult question of his guilt on the October 31st shootings of Ray and Marlene Wells. The prosecution's evidence was scanty at best, consisting of a generic identification of a male Hispanic seen in the vicinity of the Wells house at the time of the shooting, and the bargained-for testimony of a heroin addict and dedicated felon as to a purported post-offense admission by petitioner. At the time the jurors turned to the Wells counts, they had necessarily determined in the course of reaching the Belvedere Park verdicts that petitioner was a pistol-packing, prototypical gang member, an image redo-

[28] The trial court recognized this disparity in the prosecution's proof early in the case, characterizing the Wells proof as thin. RT 12/9/85, pp. 45A-46A.

lent of the uncontrollable violence ravaging the inner cities of California. The prosecutor had earlier made a specific effort to conjure up just that image, urging the jury in argument to see through the asserted veneer of petitioner's courtroom appearance and to instead imagine him with a mean-looking mustache and slicked-back hair, i.e., a stereotype of a Hispanic street "thug."[29] Moreover, the prosecutor made general efforts to preempt the moral high ground in the case, repeatedly attacking both petitioner and defense counsel throughout his argument. For example, after defense counsel had at one point objected to the admission of an autopsy photograph of Marlene Wells, unclothed, as irrelevant and prejudicial, the prosecutor worked this into his closing argument as follows: "She [Marlene Wells] sees *this heathen here* execute her husband and his [sic] trying to get out of there. She [defense counsel] wants to know why we show, they showed areas of pubic hair on this girl. *It's disgusting.*" RT 5619 (emphasis supplied). The prosecutor's characterization of petitioner as a "heathen," a derogatory term meaning "infidel" or "barbarian," and his manifestation of disgust at the defense,[30] clearly conveyed the mantle of

[29] The prosecutor argued:

> Today, she [defense counsel] said the defendant is clean cut. He has no mustache. He is wearing glasses. He is in a suit. He is dressed up.
>
> Now I am telling you again *this is just a ploy. You take a thug like this. He had a mustache, no glasses, a different hairstyle out there on the street,* give him a haircut, shave his mustache, put a set of glasses on his face, dress him up in a suit and you think he is a lawyer sitting over there. The people that have known him for years, they are looking over at this guy and they are saying, "I don't know that guy. I have never seen him look like that." RT 5237 (emphasis supplied).

[30] The prosecutor's argument was riddled with attacks on petitioner and defense counsel. The prosecutor trashed the defense as "an intentional fraud being perpetrated on the court," RT 5312-5313, expressed his personal revulsion, and showered shame onto the defense: "Every time I think about this nonsense, it's a shame that I got to spend all this time trying to get you to know it," RT 5331; "[]t]hat makes me sick everytime [sic] I think about that nonsense," RT 5573. See Appellant's Opening Brief, argument IX, pp. 105-130.

moral righteousness assumed by the prosecutor.[31]

The prosecutor repeatedly described the defense in terms of a tasteless story about adultery, in which a suspicious husband named Charlie finds his best friend Tom *in flagrante delicto* with his wife, RT 5246, an immorality tale wholly unrelated to any factual basis in this case. Nonetheless, the prosecutor repeatedly characterized the defense as standing in the place of the adulterous friend casting around for an explanation of his immoral conduct.[32]

Against this backdrop, the jury deliberated on the Wells counts. The length of deliberations on those counts, compared to the Belvedere Park counts, overwhelmingly demonstrates that the jury was in no way bowled over by the prosecution's *evidence*. The jury's questions during the Wells deliberations confirm that they were struggling with the evidence. Under these circumstances there is a very strong probability that the jury reached a verdict of accommodation in apparent accord with the reasonable

[31] The prosecutor's moral righteousness carried through guilt phase and into penalty phase as well, where he argued to the jurors that they would be "doing God's work" if they imposed the death penalty; that the imposition of the death penalty would provide for petitioner the positive opportunity to "get his soul right"; and that the Bible (Romans 13:1-7, recited to the jury) required the imposition of the death penalty in this case. RT 6539-6540. See *People v. Sandoval*, 4 Cal.4th at 192-193.

[32] "That's what this defense reminds me of. You have got to say something. Tom had nothing he could say. Standing there half-clothed, the wife, in his condition, the car out front, and that's the only thing he could come up with.

And I'm going to point out to you examples of where that's happened in this case." RT 5247.

doubt instruction given in this case, but in actual violation of the standard of proof beyond a reasonable doubt. The jury may well have resolved the problems and shortcomings of the prosecutor's evidence by recourse to the current understandings of the terms moral evidence and moral certainty, all of which would have redounded to petitioner's detriment. The prosecutor having branded petitioner as, inter alia, a heathen, and having analogized the defense to a brazen adulterer caught in the act, the jury would view the "moral evidence" as pointing to petitioner's guilt. With "moral certainty" connoting only a probability of guilt, a personal persuasion going beyond the factual evidence, or both, the jury likely followed the instructions to the best of their ability and returned guilty verdicts in volation of the guarantees of the Fifth and Sixth Amendments. In light of the closeness of the case,[33] petitioner's convictions, particularly the Wells counts, must be reversed.

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[33] Federal constitutional jurisprudence has long recognized that the closeness of the evidence weighs heavily in favor of reversal where a constitutional error has occurred. *Strickland v. Washington*, 466 U.S. 668, 673 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Drake v. Kemp*, 762 F.2d 1449, 1461 (11th Cir. 1985) (issuing habeas relief where "the jury deliberated at length before finding Drake guilty"); *Brooks v. Kemp*, 762 F.2d 1397, 1402, n.27 (11th Cir. 1985) ("it is appropriate . . . to consider weakness in the evidence of guilt since an important aspect of the jurisprudence is to minimize the risk that an innocent person will be executed"); *Newlon v. Armontrout*, 885 F.2d 1328, 1337-1338 (8th Cir. 1989) (length of jury deliberations one factor in finding prejudice); *United States v. Duncan*, 850 F.2d 1104, 1113-1114 (6th Cir. 1988) (reversing conviction because of confusing jury instruction based in part on length of jury deliberations).

V. THE WANING OF THE MORAL CERTAINTY LANGUAGE IN AMERICAN JURISPRUDENCE.

The overwhelming number of state and federal jurisdictions have long since discarded the moral certainty and moral evidence language in their reasonable doubt instructions. Appendix A, Survey of Current Usage of Moral Certainty Language in Reasonable Doubt Instructions, identifies the instructional practices in each state, showing only five jurisdictions which currently approve moral certainty language—California, Idaho, Massachusetts, North Dakota, and Tennessee. Massachusetts cleaves to its *Webster* charge notwithstanding mounting criticism from the federal courts. See, e.g., *Lanigan v. Maloney*, 853 F.2d 40; *Smith v. Butler*, 696 F.Supp. 748, 753 (D. Mass. 1988) ("Despite longstanding, continuing and current dissatisfaction by the First Circuit with the moral certainty formulations, . . . the Massachusetts state courts have shown no disposition to abandon its use"). The Supreme Courts of North Dakota and Tennessee have not addressed their respective instructions since *Cage v. Louisiana* was decided. It is clear that the moral certainty terminology is a vestigial relic well on its way to a long overdue retirement.

Appendix B, currently Approved Reasouable Doubt Instructions, sets out the text of currently approved jury instructions in each state. Most of these provide unobjectionable renditions of the core concept of proof beyond a reasonable doubt. They demonstrate both the breadth of the adherence to that concept across the nation and the wide variety of ways in which it can be expressed consistently with the Fifth and Sixth Amendments. The instruction in this case, with its reliance on moral certainty and moral evidence terminology, is beyond the pale. Petitioner's trial was tainted by an instruction both far out of alignment with mainstream jurisprudence and violative of the Constitution.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of California.

Respectfully submitted,

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APPENDICES

APPENDIX A

SURVEY OF CURRENT USAGE OF MORAL CERTAINTY LANGUAGE IN REASONABLE DOUBT INSTRUCTIONS

I. States Currently Using "Moral Certainty" Language

State	Instruction Practice	Comments
California	Pattern Instruction CALJIC 2.90	Includes both moral evidence and moral certainty language
Idaho	No pattern instruction	Case law approves instruction tracking *Webster* language—*State v. Rhoades*, 822 P.2d 960 (1991); *State v. Hoffman*, 851 P.2d 934 (1993)
Massachusetts	Pattern Instruction 2.05 ("*Webster* Charge" (modern syntax)	"Moral evidence" deleted from the "Modern Syntax" version of the *Webster* instruction
North Dakota	Pattern Instruction 2002	There is no reported decision of the North Dakota Supreme Court evaluating this instruction in light of *Cage v. Louisiana*
Tennessee	Pattern Instruction Crim. 2.03	There is no reported decision of the Tennessee Supreme Court evaluating this instruction in light of *Cage v. Louisiana*

II. States Not Currently Using "Moral Certainty" Language

Alabama	Recommended Judicial College Instruction
Alaska	Pattern Instruction, APJI (Crim. 1.52) (1987 ed.)

State	Instruction Practice	Comments
Arizona	Pattern Instruction	Case law recommends against an explanatory instruction and condemns "mere possible doubt" language—*State v. Chavarria*, 1993 Westlaw 313.70 [Ariz. App. 1993]
Arkansas	Pattern Instruction, AMCI 110	
Colorado	C.J.I. 3.04	"Hesitate to act" language
Connecticut	No pattern instruction	Various instructions approved in caselaw: *State v. Gomez*, 672 A.2d 1014 (Conn. 1993) ("hesitate to act" language); *State v. Dixon*, 611 A.2d 432 (Conn. App. 1992)
Delaware	"Reason and common sense" language	
Florida	Pattern Instruction No. 2.03	*Woods v. State*, 596 So.2d 156 (Fla. App. 1992) (upholding *Cage* challenge)
Georgia	Pattern Instruction	*Vance v. State*, 416 S.E.2d 516 (1993) (disapproving prior moral certainty language)
Hawaii	Pattern Instruction HSJI 3.02	
Illinois	Pattern Instruction 2.03; no explanation of reasonable doubt	
Indiana	Pattern Jury Instruction IPJI (Crim. 11.01)	*Bell v. State*, 610 N.E.2d 229 (Ind. 1993)

State	Instruction Practice	Comments
Iowa	Pattern Instruction UI 501.11—"hesitancy to act" language	Approved in *State v. McGranahan*, 206 N.W.2d 88 (Ia. 1973)
Kansas	Case Law prohibits definition or explanation	*State v. Mack*, 612 P.2d 158 (Kan. 1980)
Kentucky	Rules of Crim. Procedure prohibit definitions of reasonable doubt (Ky.R.Cr.9.56)	
Louisiana	No Pattern Instruction	
Maine	No Pattern Instruction	*State v. Pelletier*, 434 A.2d 52 (1981) (approves a language "doubt for which you can assign a reason")
Maryland	Pattern Instruction	
Michigan	Pattern Instruction CJI 2d 1.9	Recently abandoned moral certainty language; *People v. Sammons*, 478 N.W.2d 901 (Mich.App. 1991)
Minnesota	Pattern Instruction CJI 3.03	
Mississippi	Pattern Instruction MJI C.108-109	
Missouri	Statutory mandated instruction MRS 546.070(4) Pattern Instruction MAI Cr.3d 302.04	
Montana	Pattern Instruction Montana Crim. Instr. No. 1-1004	Upheld in *State v. Flesch*, 839 P.2d 1270 (Mont. 1992)
Nebraska	Pattern Instruction N.J.I. 2d Crim. 20	

State	Instruction Practice	Comments
Nevada	Statutory mandated instruction, NRS 175.211	Amended in 1991 to remove adjective "substantial" as modifying doubt necessary to acquit
New Hampshire	Case law prescribes single definition—"doubt based on reason"	*State v. Wentworth* 395 A.2d 858 (1978)
New Jersey	Pattern Instruction MJC 1.104	"Moral certainty" language abandoned in 1970's
New Mexico	Pattern Instruction UJI—Crim.14-5060—"hesitate to act" language	
New York	Pattern Instruction CJI 6.20	Case law reverses convictions where previous "moral certainty" language used—*People v. Frank*, 588 N.Y.S.2d 670 (1992)
North Carolina	Pattern Instruction N.C.P.I. Crim. 101.10	*State v. Bryant*, 432 S.E.2d 29 (N.C. 1993) reversed a conviction where reasonable doubt instruction employed pre-*Cage* "moral certainty" language
Ohio	Statutory mandated instruction—"willing to act" language—RC 2901.5(D)	"Moral evidence" reference in instruction
Oklahoma	Pattern Instruction OUJI CR.903	Case law prohibits further definitions—*Pannell v. State*, 640 P.2d 568, 570 (Okla. 1982)
Oregon	Pattern Jury U.Or.J.I. 1006—"willing to act" language	"Moral certainty" language removed in 1992

State	Instruction Practice	Comments
Pennsylvania	Pattern Instruction "hesitate to act" language	*Comm. v. Stokes*, 615 A.2d 704 (C.Pa. 1992)
Rhode Island	No Pattern Instruction	*State v. Desrusiers*, 559 A.2d 641 (R.I. 1989)
South Carolina	Pattern Instruction "hesitates to act" language	Case law specifically disapproved "moral certainty" language—*State v. Manning*, 409 S.E.2d 372 (1991)
South Dakota	Pattern Instruction SDPI 1-6-1	
Texas	Judicially mandated instruction—"hesitate to act" language	*Geesa v. State*, 820 S.W.2d 154 (Tex.Cr. App. 1991)
Utah		
Vermont	No Pattern Instruction	*State v. Francis*, 561 A.2d 392 (1989) (definition not required)
Virginia	Pattern Instruction 2.100	Case law discourages explanations—*Cooper v. Comm.*, 345 S.E.2d 775 (Va.App. 1986)
Washington	Pattern Instruction WPIC 4.01	
West Virginia	No Pattern Instruction	Case Law discourages explanations—*State v. Beckett*, 310 S.E.2d 883 (1983)
Wisconsin	Pattern Instruction WIS JI Crim.140 ("doubt for which a reason can be given")	
Wyoming	Case law prohibits definition or explanation	*Collins v. State*, 854 P.2d 688 (Wyo. 1993)
District of Columbia	Pattern Instruction "Abiding conviction" language (D.C. C.J.I. 2.09)	

APPENDIX B

CURRENTLY APPROVED REASONABLE DOUBT INSTRUCTIONS

ALABAMA

Currently approved instruction:

> Now, in this case, the burden of proving that the defendant is guilty as charged rests upon the State and before a conviction can be had in this case, the State must satisfy each and every member of the jury of the defendant's guilt and unless the State satisfies you of the defendant's guilt beyond a reasonable doubt then he is entitled to an acquittal.
>
> The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term, but it may help you some to say that the doubt which would justify an acquittal must be an actual and substantial doubt, and not a mere guess or surmise and it is not a forced or captious doubt. If, after considering all of the evidence in the case, you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt, and it would be your duty to convict the defendant. The reasonable doubt which entitles an accused to an acquittal is not a mere fanciful vague, conjectural or speculative doubt, but a reasonably substantial doubt, arising from all or part of the evidence or from the lack of evidence and remaining after a careful consideration of the testimony, such as reasonable, fair-minded and conscientious men would entertain under all the circumstances. Now, you will observe, gentlemen, that the State is not required to convince you of the defendant's guilt beyond all doubt, but simply beyond all reasonable doubt. If, after comparing and considering all the evidence in this case, your minds are left in such a condition that you can not say you have an abiding

conviction of the defendant's guilt, then you are not convinced beyond a reasonable doubt, and the defendant would be entitled to an acquittal. (Alabama Judicial College, recommended instruction, commonly used.)

Case law:

Ex Parte Williams, 93 Westlaw 16380 (Ala.1993) (addressing a supeseded reasonable doubt instruction, the Court states that reasonable doubt and moral certainty are "not exactly synonymous," and holds that an instruction equating them and defining doubt as "an actual substantial doubt" may be error, but is harmless, noting that the instruction did not use the "grave uncertainty" language condemned in *Cage*).

ALASKA

Currently approved instruction:

Presumption of Innocence, Burden of Proof Beyond a Reasonable Doubt

The distinguishing features of a criminal trial are what are known in the language of the law as the presumption of innocence and the burden of proof beyond a reasonable doubt. The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate—with no evidence favoring conviction. The presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt, after careful and impartial consideration of all the evidence in the case.

This last-mentioned requirement, that you be satisfied beyond a reasonable doubt of defendant's

guilt, is what is called the burden of proof. It is not required that the prosecution prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty. Rather, the test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense. Proof beyond a reasonable doubt must be proof of such a convincing character that, after consideration, you would be willing to rely and act upon it without hesitation in your important affairs. A defendant is never to be convicted on mere suspicion or conjecture.

The burden of proving the defendant guilty beyond a reasonable doubt always rests upon the prosecution. This burden never shifts throughout the trial, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant has the absolute right not to testify, and you must not draw any inference against the defendant for not testifying. Thus a reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove every essential element of the crime charged, beyond a reasonable doubt, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

Alaska Pattern Jury Instruction (Crim.1.52)

Case law:

McCurry v. State, 538 P.2d 100 (Alaska 1975); *Davenport v. State*, 519 P.2d 452 (Alaska 1974).

ARIZONA

Currently approved instruction:

> OPTIONAL: "The term reasonable doubt means doubt based upon reason. This does not mean imaginary or possible doubt. It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence." (Recomended Arizona Jury Instruction Standard Criminal 5 (1989)—but majority of Drafting Committee believes a definition is "ineffective."

Case law:

> *State v. Duzan*, 93 WL 106788 (Ariz.App. 1993) [rejecting due process violation claim because above instruction excluded a "possible doubt" noting that the *Cage* instruction was "markedly different," recommends against explanatory instruction].
>
> *State v. Chavarria*, 93 WL 31370 (Ariz.App.1993) [condemns portion of instruction stating that reasonable doubt it not mere possible doubt].

ARKANSAS

Currently approved instruction:

> Reasonable doubt is not a mere possible or imaginary doubt. It is a doubt that arises from your consideration of the evidence and one that would cause a careful person to pause and hesitate in the graver transactions of life. A juror is satisfied beyond a reasonable doubt if after an impartial consideration of all the evidence he or she has an abiding conviction of the truth of the charge. (AMCI 110)

CALIFORNIA

Currently approved instruction:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CALJIC 2.90)

Case law:

> *People v. Sandoval*, 4 Cal.4th 155 (Cal. 1992) [approving above instructions]

COLORADO

Currently approved instruction:

> Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.
>
> If you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty. If you find from the evidence that the prosecution has failed to prove

any one or more of the elements beyond a reasonable doubt you will find the defendant not guilty. (COLJI 3.04)

CONNECTICUT

Currently approved instruction:

A reasonable doubt is . . . that would cause you as reasonable men and women to hesitate to act . . . weight and important matters . . . your own affairs. (*Gomez*)

This phrase, reasonable doubt, has no technical nor unusual meaning. You get the real meaning of the phrase if you emphasize the word reasonable. A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt that is something more than a guess or a surmise. A reasonable doubt is not such a doubt as is raised by one who questions simply for the sake of argument. It is not a doubt suggested by the ingenuity of counsel which is not warranted by the evidence. A reasonable doubt is a real doubt, an honest doubt, a doubt which has its foundation in the evidence [or absence thereof] . . . and not a whimsical or captious doubt, but a substantial doubt, and again, it must rest upon some element of weakness in the proof that gives you [] a reason for doubting guilt. . . . If there is no reasonable ground for doubting guilt, then it is made out beyond a reasonable doubt . . . not an imaginary doubt, but a doubt raised upon reason and common sense. (*Dizon*)

Case law:

State v. Gomez, 622 A.2d 1014 (Conn. 1993) [upholding "hesitate to act" instruction above, as similar to jury instructions previously approved by the court, and which contains none of the *Cage* language].

State v. Dizon, 611 A.2d 432 (Conn.App. 1992) [refusing to find the instruction as a whole defective

because of single phrase "a substantial doubt" and concluding that the *Cage* error was "the cumulative effect of three offending terms that hopelessly polluted the trial court's reasonable doubt instructions"].

DELAWARE

Currently approved instruction:

The law presumes every person charged with a crime to be innocent. This presumption of innocence requires a verdict of not guilty unless you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt. The burden is upon the State to prove all of the facts necessary to establish the crime charged beyond a reasonable doubt. Reasonable doubt is a practical standard.

On the one hand, in criminal cases, the law imposes a greater burden of proof than in civil cases. Proof that a defendant is probably guilty is not sufficient. On the other hand, the law recognizes that certainty is rarely possible in matters involving human behavior. The State is, therefore, not required to prove guilt to a certainty. Reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt that a fair and reasonable juror would have after carefully considering the evidence. If you have a reasonable doubt of the defendant's guilt, you must return a verdict of not guilty.

Case law:

Zimmerman v. State, 191 Del.Super., Lexis 3441 (Del. Super.1991)

FLORIDA

Currently approved instruction:

The defendant has entered a plea of not guilty. This means you must presume or believe the defend-

ant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving the following two elements:

1. The crime with which the defendant is charged was committed.
2. The defendant is the person who committed the crime. The defendant is not required to prove anything.

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable

doubt, you should find the defendant guilty. (Pattern Instruction No. 2.03)

Case law:

Woods v. State, 596 So.2d 156 (Fla.App.1992) [upholding the above instruction over a *Cage* challenge].

GEORGIA

Currently approved instruction:

D. Presumption of Innocence: Burden of Proof; Reasonable Doubt

This defendant is presumed to be innocent until proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his/her favor. This presumption remains with the defendant until it is overcome by the state with evidence which is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the offense charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt.

The burden of proof rests upon the state to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

There is no burden of proof upon the defendant whatever, and the burden never shifts to the defendant to prove innocence.

However, the state is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty. A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror, honestly seeking the truth. It is a

doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but is a doubt for which a reason can be given, arising from a consideration of the evidence, a lack of evidence, a conflict in the evidence, or any combination of these.

If after giving consideration to all the facts and circumstances of this case, your minds are wavering, unsettled or unsatisfied, then that is a doubt of the law, and you should acquit the defendant; but, if that doubt does not exist in your minds as to the guilt of the accused, then you would be authorized to convict the defendant.

If the state fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

Case law:

Vance v. State, 416 S.E.2d 516 (Ga. 1993) ["moral certainty" language of superseded instruction not reversible error but "better practice is not to use it"; see fn. 5 stating that " 'moral and reasonable certainty' " language is unnecessary, unhelpful, and possibly misleading: "What is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual. This diversity renders any precise definition of 'moral certainty' elusive, and any uniformity of interpretation by jurors unlikely"].

HAWAII

Currently approved instruction:

Presumption of Innocence; Reasonable Doubt

You must presume the defendant is innocent of the charge against him her. This presumption remains with the defendant throughout the trial of the case, unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.

The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty or proving every material element of the offense charged against the defendant beyond a reasonable doubt.

You must not find the defendant guilty upon mere suspicion or upon evidence which only shows that the defendant is probably guilty. What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt?

It is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense.

Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.

Be mindful, however, that a doubt which has no basis in the evidence presented, or the lack of evidence, or reasonable inferences therefrom, or a doubt which is based upon imagination, suspicion or mere speculation or guesswork is not a reasonable doubt.

What is proof beyond a reasonable doubt?

If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, then the prosecution has proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant guilty. (HSJI 3.02)

IDAHO

Currently approved instruction:

> A reasonable doubt is a doubt based upon evidence or lack of evidence and upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. . . . If after going over in your minds the entire case, you have an abiding conviction, to a moral certainty, of the truth of the charge, then you are convinced beyond a reasonable doubt. . . .

Case law:

State v. Pratt, 1993 WL 27731 (Idaho 1993) [upholding an instruction similar to CALJIC 2.90, but expanded to include "a reasonable doubt [] leaves your minds in a condition that you do not feel an abiding faith amounting to a moral certainty that the defendant is guilty" and "to convict . . . does require guilt to be established to your satisfaction to a moral certainty, and that is a certainty that convinces and directs your understanding and satisfies your reason and judgment of the truth" because "as in *Rhoades* the reasonable doubt instruction [] is not similar to [the one] in *Cage*"].

State v. Rhoades, 822 P.2d 960 (Idaho 1991) [holding that "the only appropriate instruction on reasonable doubt is the California jury instruction"].

State v. Hoffman, 851 P.2d 934 (Idaho 1993) (upholding above above instruction because it is "substantially the same" as that in *Rhoades* and did not use the "grave uncertainty" language].

ILLINOIS

Currently approved instruction:

> [(The) (Each)] defendant is presumed to be innocent of the charge(s) against him. This presumption remains with [(him) (each defendant)] throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of [(the) (each)] defendant beyond a reasonable doubt, and this burden remains with the State throughout the case. [(The) (A)] defendant is not required to prove his innocence. (Illinois Pattern Jury Instructions in Criminal Cases No. 203)

Case law:

> The Illinois Supreme Court Committee on Pattern Jury Instructions recommends that no instruction be given defining the term "reasonable doubt." They quote the Illinois Supreme Court as stating that "Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued." *People v. Malmenato,* 14 Ill.2d. 52, 61, 150 N.E.2d 806, 811 (1958).

INDIANA

Currently approved instruction:

> A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation. ¶ If, after consid-

ering all of the evidence, you have reached a firm belief in the guilt of the Defendant that you feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction. (Indiana Pattern Jury Instructions (Criminal) 11.01)

Case law:

Bell v. State, 610 N.E.2d 229 (Ind. 1993) [upholding above instruction on challenge to words "fair" and "actual" because those words are further defined by the use of the language " 'doubt based on reason and common sense and not upon imagination or speculation' "; and rejecting further defense argument that the "firm belief, without hesitation" language is the equivalent of the "moral certainty" language found defective in *Cage*].

IOWA

Currently Approved Instruction:

The burden is on the State to prove the defendant guilty beyond a reasonable doubt.

A "reasonable doubt" is such a doubt as fairly and naturally arises in your mind and by reason of which you cannot say that you have a full and abiding conviction of the guilt of the defendant; and if, after considering all of the circumstances as disclosed by the evidence, you find your mind wavering or vacilating [sic], then you have a reasonable doubt, and the defendant is entitled to the benefit of such doubt and you must acquit him. A reasonab'e doubt may arise from the evidence in the case or it may arise from a lack or failure of evidence, and it must be such a

doubt as would cause a reasonable, prudent and considerate man to pause and hesitate before acting in the graver and more important affairs of life. But you should not ignore credible evidence to hunt for doubt, and you should not entertain such doubt as is purely imaginary or fanciful or based on groundless conjecture. If, after a careful and impartial consideration of all of the evidence in the case, you have a full and abiding conviction of the guilt of the defendant, then you are satisfied beyond a reasonable doubt, otherwise you are not satisfied beyond a reasonable doubt. (UI 501.11)

Case law:

State v. McGranahan, 206 N.W.2d 88 (Ia. 1973) [approving above instruction]

KANSAS

Currently Approved Instruction:

Kansas case law precludes definitions or explanations of reasonable doubt.

Case law:

State v. Mack, 612 P.2d 158 (Kan. 1980) [prohibiting definitions or explanations)

KENTUCKY

Currently Approved Instruction:

R.Cr. 9.56, "Reasonable Doubt" provides:

(1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant to be innocent of a crime, and the indictment (or other accusatory document) shall not be considered

as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty (and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree)."

(2) The instructions should not attempt to define the term "reasonable doubt."

LOUISIANA

Currently Approved Instruction:

No statewide pattern instruction.

Case law:

State v. Berniard, WL 302687 (La.App.1993) [in light of *Sullivan*, court reverses where *Cage* instruction given, even though defendant failed to object]).

State v. Harrison, 609 So.2d 789 (La. 1992) [where jury was instructed that a reasonable doubt was "such a doubt as would give rise to a grave uncertainty", the Court reversed; even though *Cage* went "beyond" this instruction by including moral certainty, and actual substantial doubt, the Supreme Court state that the word "grave" suggested a higher degree of doubt than required under reasonable doubt standard: the jury here might have had a reasonable doubt but not a grave uncertainty].

State v. Daniels, 614 So.2d 97 (La.App.1993) [upholding instruction similar to that in *Cage*, but without "moral certainty" language, because it was not the "same combination" of terms used in *Cage*].

State v. Smith, 600 So.2d 919 (La.App.1992) [upholding "actual or substantial doubt" instruction that did not contain the grave uncertainty or moral certainty language of *Cage*].

MAINE

Currently Approved Instruction:

No statewide pattern instructions.

Case law:

State v. Pelletier, 434 A.2d 52 (1981) [approving instruction and defines reasonable doubt in terms of "doubt for which you can assign a reason".]

MARYLAND

Currently Approved Instruction:

The State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. A reasonable doubt is a doubt founded upon reason. It is not a fanciful doubt, a whimsical doubt or a capricious doubt. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief *without reservation* in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

Case law:

Wills v. State, 620 A.2d 295 (Md.1993) [reversing conviction because of trial judge's extemporaneous reasonable doubt instruction emphasizing the connection necessary for life decisions].

MASSACHUSETTS

Currently approved instruction:

I. *Webster* Charge (Modern Syntax)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

I have told you that every person is presumed to be innocent until he is proved guilty, and that the burden of proof is on the the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

II. Webster Charge (Verbatim)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on [fallible] evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, or the truth of the charge.

The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in fact of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

For it is not sufficient to establish a probabilty, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt. . . ." (Mass. Model Jury Instructions 2.05 & 2.051 (1988 ed.))

Case law:

Com. v. Beldotti, 567 N.E.2d 1219 (Mass. 1991) [no error in using "moral certainty" language of the "standard charge," unless used "in isolation"; and

rejecting contention that trial court's freehand embellishments of the standard charge were defective, to wit, the judge's statement that "we are dealing with human beings . . . and human memory, so we do not require the government to prove its case beyond all doubt"].

MICHIGAN

Currently approved instruction:

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continued throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his her] innocence or to do anything. [] If you find that the prosecutor has not prove every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case. (CJI2d 3.2)

Case law:

People v. Sammons, 498 N.W.2d 901 (Mich.App. 1991) [noting the recent deletion of moral certainty language from the pattern instruction]

The Commentary to the revised version above notes that the committee voted to abandon the phrase "moral certainty" because "the phrase 'mora! certainty' was ambiguous at best, particularly in a diverse and pluralistic society undergoing rapid change."

MINNESOTA

Currently approved instruction:

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in the most important of their affairs. A reasonable doubt is a doubt based on common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt. (Crim. Jury Instruction 3.03)

MISSISSIPPI

Currently approved instruction:

The Court instructs the jury that you are bound, in deliberating upon this case, to give the defendant the benefit of any reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt of the defendant's guilt when the evidence simply makes it probable that the defendant is guilty. Mere probability of guilt will never warrant you to convict the defendant. It is only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him/her guilty. You might be able to say that you believe him/her to be guilty, and yet, if you are not able to say on your oaths, beyond a reasonable doubt, that he/she is guilty, it is your sworn duty to find the defendant "Not Guilty." (Mississippi Jury Instruction C.108)

The masculine form as used in these instructions, if applicable as shown by the text of the instructions and the evidence, applies to a female person or a corporation.

The Court instructs the jury that a reasonable doubt may arise from the whole of the evidence, the conflict of the evidence, the lack of evidence, or the insufficiency of the evidence; but however it arises, if it arises, it is your sworn duty to find the defendant "Not Guilty." (Mississippi Jury Instruction C.109)

MISSOURI

Currently approved instruction:

The charge of any offense is not evidence, and it creates no inference that any offense was committed or that (the) (either) (any) defendant is guilty of an offense.

(The) (Each) defendant is presumed to be innocent, unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that (the) (either) (any) defendant is guilty.

A reasonable doubt is doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that (a) (the) defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty. (MAI.Cr.3d 302.04)

Case law:

State v. O'Brien, 857 S.W.2d 212 (Mo. 1993) [upholding instruction against *Cage*-type challenge].

MONTANA

Currently approved instruction:

Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of doubt. (Montana Criminal Instruction No. 1-004)

Case law:

State v. Flesch, 839 P.2d 1270 (Mont. 1992) [upholding above instruction as "considerably different" from that in *Cage;* Montana Court has held that "more complicated instructions on reasonable doubt did not help clarify the State's burden of proof, but rather had a tendency to confuse the jury"].

NEBRASKA

Currently approved instruction:

A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. A reasonable doubt may arise from evidence adduced by either party or from a lack of evidence on the part of the State. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (NJI2d Crim. 2.0 (1992))

Case law:

State v. Gatson, 93 WL 373476 (Sept. 24, 1993) [upholding above instruction against challenge to the

last sentence, on the ground that *Cage* did not disapprove of the instruction in that case on the grounds of its "not a possible doubt" language].

NEVADA

Currently approved instruction:

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. (NRS 175.211)

NEW HAMPSHIRE

Currently approved instruction:

Under our constitutions, all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. The burden of proving guilt is entirely on the State. The defendant does not have to prove his innocence. The defendant enters this courtroom as an innocent person, and you must consider him to be an innocent person, and you must consider him to be innocent until the State convinces you beyond a reasonable doubt that he is guilty of every element of the alleged offense. If, after all the evidence and arguments, you have a reasonable doubt as to the defendant's having committed any one or more of the elements of the offense, then you must find him not guilty.

A "reasonable doubt" is just what the words would ordinarily imply. The use of the word reasonable means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away. Rather, it is such a doubt based upon reason as remains after consideration of all of the evidence that the State has offered against it. The test you must use is this: If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you must find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you should find the defendant guilty.

Case law:

State v. Wentworth, 395 A.2d 858 (1978) [prescribing the above instruction "[t]o avoid needless litigation"].

NEW JERSEY

Currently approved instruction:

Model Jury Charge 1.104

NEW MEXICO

Currently approved instruction:

The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of this guilt.

The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The

test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and comon sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of his life. (UJI 14-5060)

NEW YORK

Currently approved instruction:

This completes my instructions on the constitutional safeguards of the presumption of innocence and the burden of proof.

I now discuss with you the constitutionally mandated standard of proof in all criminal cases, that of proof of guilt beyond a reasonable doubt.

The standard of proof required by law in every criminal case is proof of guilt beyond a reasonable doubt. That standard, however, does not require the People to prove the defendant guilty beyond all possibility of doubt or beyond a shadow of a doubt. It requires the People to establish the defendant's guilt beyond a *reasonable* doubt.

Our law, therefore, requires that before this jury may convict the defendant, each of you must be satisfied that the credible evidence is sufficient to convince you beyond a reasonable doubt that the defendant is in fact guilty.

The evidence must satisfy you beyond a reasonable doubt that the defendant is in fact the person who committed the crime(s) charged.

The evidence must also establish beyond a reasonable doubt each and every essential element of the crime(s) charged as I shall later define such elements.

What does the law mean when it requires proof of guilt "beyond a reasonable doubt?" When is a doubt of guilt a reasonable doubt under our law?

A doubt of the defendant's guilt, to be a reasonable doubt, must be a doubt for which some reason can be given. The doubt, to be reasonable, must therefore arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case. The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case.

A doubt of guilt is not *reasonable* if, instead of being based on the nature and quality of the evidence or insufficiency of the evidence, it is based on some guess or whim or speculation unrelated to the evidence in the case. Also, a doubt of guilt is not a *reasonable* doubt if it is based merely an sympathy for the defendant or from a mere desire by a juror to avoid a disagreeable duty.

I therefore repeat: A doubt of a defendant's guilt, to be a *reasonable* doubt, must arise either from the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case.

Therefore, the first duty of each juror is to consider and weigh all the evidence in the case and decide which you believe is credible and worthy of your consideration.

The next duty of each juror is to determine whether the juror has, in fact, a reasonable doubt of the defendant's guilt as that term is defined in our law.

A "reasonable doubt," our law says, is an *actual* doubt, one which you are conscious of having in

your mind after you have considered all the evidence in the case. If, after doing so, you then feel *uncertain* and not fully convinced of the defendant's guilt, *and* you are also satisfied that in entertaining such a doubt you are acting as a reasonable person shou'd act in a matter of this importance, then that is a "reasonable doubt" of which the defendant is entitled to the benefit.

I repeat, it is the duty of each juror carefully to review, weigh and consider all the evidence in the case.

If, after doing so, you find that the People have not proved the defendant's guilt beyond a reasonable doubt, as I have defined that term to you, then you must find the defendant *not* guilty.

On the other hand, if you are satisfied that the People have proved the defendant's guilt beyond a reasonable doubt, as I have defined that term to you, you may then find the defendant guilty. (CJI 6.20)

Case law:

People v. Melito, 93 WL 264195 (July 16, 1993) (N.Y.A.D. 4 Dept.) [in memorandum decision, the court reverses under *Sullivan* where court informed the jury that reasonable doubt "is a doubt which leaves your mind in such a state of suspense that you are unable to say that you are convinced, to a moral certainty, of defendant's guilt"].

People v. Frank, 588 N.Y.S.2d 670 (1992) [instructions which employed the phrases "morally and reasonably certain" and "reasonable doubt must therefore be based entirely and absolutely on good sound substantial reason" and "it is possible to establish the guilt of a defendant . . . to a reasonable degree of certainty" "effectively reduced the People's burden

of proof and failed to convey the proper standard to the jury"; reversing under *Cage*].

NORTH CAROLINA

Currently approved instruction:

The defendant has entered a plea of "not guilty." The fact that he has been [indicted] [charged] is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty," he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt. (N.C.P.I.—Crim.101.10)

Case law:

State v. Williams, 93 WL 341049 (Sept. 10, 1993) [reversing under *Sullivan* for an instruction including "moral certainty" which was "essentially identical" to that in *Bryant, infra*].

State v. Bryant, 432 S.E.2d 291 (N.C. 1993) (examined this instruction on reasonable doubt:

When it is said that the jury must be satisfied of the defendant's guilty beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. ¶ If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty

in the defendant's guilt, then they have a reasonable doubt; otherwise not. ¶ A reasonable doubt, as that term is employed . . . is an honest substantial misgiving generated by the insufficiency of the proof.

The Court believes the crucial term in the [*Cage* instruction] is "moral certainty. The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty." Citing dictionaries, the Court says moral certainly "may exist when something is 'based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration." "Truth is 'conformity to knowledge, fact, actuality, or logic, while the word moral is 'concerned with the judgment of the goodness or badness of human action and character.'" "A jury instruction which emphazises what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent" with jury's role. A moral certainty instruction "increases the possibility that a jury may convict . . . because the jury believes he is morally guilty without regard to the sufficiency of the evidence presented at trial. . . Thus, when reasonable doubt is defined in terms of 'grave uncertainty' . . . and the jury is then told that what is required for conviction is moral certainty . . . the instruction will not pass muster under *Cage*."

NORTH DAKOTA

Currently approved instruction:

> The phrase "reasonable doubt" means what the words imply. It is a doubt based on reason arising from a thorough and impartial consideration of all of the evidence in the case. It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. While you cannot convict the Defendant on mere surmise or conjecture, neither should you go outside the evidence to imagine doubts to justify acquittal. If, after careful deliberation, you are convinced to a moral certainty that the Defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt. (North Dakota Pattern Jury Instruction on Reasonable Doubt, no. 2002)

Case law:

> *City of Minot v. Rubbelke*, 456 N.W.2d 511 (N.D. 1990) [affirming conviction based on reasonable doubt instruction stating the same concept as the pattern instruction in different terms].

OHIO

Currently approved instructions nos. 403.10 and 403.50:

> 403.10 Burden of proof
>
> 1. The defendant(s) is (are) presumed innocent until his (their) guilt is established beyond a reasonable doubt. The defendant(s) must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged in the indictment (information) (complaint) (or of any lesser offense included within that charge).
>
> 403.50 Reasonable doubt
>
> 1. REASONABLE DOUBT IS PRESENT when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is

proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

R.C. SS 2901.05(D) explains reasonable doubt in the exact language of the above instruction.

OKLAHOMA

Currently approved instruction:

The defendant is presumed innocent of the crime charged, and the persumption continues unless, after consideration of all the evidence, you are convinced of his guilt beyond a reasonable doubt. The state has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt.

The defendant must be found not guilty unless the state produces evidence which convinces you beyond a reasonable doubt of each element of the crime. (OUJI Cr.903)

Case law:

Pannell v. State, 640 P.3d 568, 570 (Okla. 1982) [precludes explanatory instruction regarding reasonable doubt].

OREGON

Currently approved instruction:

The defendant is innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on the State to prove the guilt of a defendant beyond a reasonable doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. Reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced that

the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs. (U.Cr.J.I. no. 1006)

Case law:

State v. Castrejon, 856 P.2d 616 (Ore. July 22, 1993). [The trial court defined reasonable doubt as "mean[ing] just that," and "the State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt." The defendant argued that the trial court's refusal to give his requested instruction, taken from Uniform Criminal Jury Instruction 1006, which *at that time* defined reasonable doubt as "an honest uncertainty" and "after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs." *As the December 1992 Comment to U.Cr.J.I. 1006 explains, "the instruction has since been changed to remove the reference to moral certainty in light of Cage."* Oregon Supreme Court holds that no "particular definition of reasonable doubt need be given to the jury" and that the instruction given did not mislead the jury, noting that many courts have agreed "that the phrase 'reasonable doubt' is its own best explanation.'" Footnote 7 notes that the trial court refused to give the requested "moral certainty" instruction because "I think it is misleading to instruct a jury [on] that because I do not and I don't think anyone can tell me what a moral certainty is, I believe—I have a great faith in the English language that the drafters [of the state and federal constitution] meant what they said, they said beyond a reasonable doubt."]

PENNSYLVANIA

Currently approved instruction:

> A reasonable doubt is such a doubt as would cause a person to hesitate in arriving at a conclusion in a matter of importance to that person; therefore, should you, after considering all of the evidence, have in your mind such a doubt as would cause you to hesitate in arriving at a conclusion in matters of importance to yourselves, then it is your duty to give the defendant the benefit of that reasonable doubt and find him not guilty. ¶ The doubt to be reasonable must be one which fairly strikes a conscientious mind and clouds the judgment. It is not such a doubt as one might dig up, conjure up, or summon up out of nowhere for purposes of escaping the consequences of an unpleasant verdict [], but it is a doubt which is reasonable, an honest and real doubt fairly arising out of the evidence that is presented with respect to some element of the crime. ¶ A reasonable doubt is not merely an imagined or passing fancy that come into the mind of a juror. It must be a doubt arising from the evidence that is *substantial* and well founded on reason and common sense. ¶ A reasonable doubt such as one takes notice of by a juror in deciding the case [] is of the same nature as a doubt that would cause a reasonable man or woman in the conduct of his or her own affairs in a matter of importance to himself or herself to stop, hesitate, and seriously consider as to whether he or she should do a certain thing before finally acting.

Case law:

> *Com. v. Stokes*, 615 A.2d 704 (Pa. 1992) [rejecting *Cage* challenge, and referring to above instruction as—except for one possibly improper word (substantial)—"an otherwise model charge"].

RHODE ISLAND

Currently approved instruction:

> No statewide pattern instructions.

Case law:

> *State v. DesRosiers*, 559 A.2d 641 (R.I. 1989) [upheld an instruction containing moral certainty language as adequate; there is no reported post-*Cage* decision].

SOUTH CAROLINA

Currently approved instruction:

> A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

Case law:

> *State v. Baker*, 424 S.E.2d 492 (S.C. 1992) [relying on *Manning* to hold the following instruction defective: "A reasonable doubt . . . is a doubt arising from the evidence . . . that created a strong uncertainty in your minds. . . ."].
>
> *State v. Manning*, 409 S.E.2d 372 (S.C. 1991) [trial court defined reasonable doubt as "substantial doubt" for which you can give "a real reason" and "moral certainty and beyond a reasonable doubt are the same things" both of which connote "a degree of proof which is distinguished from an absolute certainty"; the S.C. Supreme Court reversed holding that *Cage* "disapproved a standard of moral rather than evidentiary certainty" and such a charge is misleading "in that it allows a juror to base a finding of guilty upon a subjective feeling rather than upon an evaluation of the evidence," holding that the use "of a moral certainty standard" is a constitutional

violation when "it is combined with other terms [] which 'suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard' "].

State v. Johnson, 410 S.E.2d 547 (S.C. 1991) [upholding an instruction that defined reasonable doubt as a substantial, not a "weak doubt, or a fanciful doubt" because, unlike *Manning*, the term substantial doubt was not used *in combination* with the reference to moral rather than evidentiary certainty].

SOUTH DAKOTA

Currently approved instruction:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things that we know with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and return a verdict of not guilty. (South Dakota Pattern Instruction 1-6-1)

TENNESSEE

Currently approved instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense. (Tennessee Pattern Jury Instructions—Criminal (3d ed. 1992))

Case law:

> No reported decision since *Cage*.

TEXAS

Currently approved instruction:

> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon own affairs. In the event you have a reasonable it without hesitation in the most important of your own affairs in a matter of importance ot himself or doubt as to the defendant's guilt . . . you will acquit. . . .

Case law:

> *Geesa v. State*, 820 S.W.2d 154 (Tex.Cr.App. 1991) [reversing where *no* definition of reasonable doubt

was given, and ruling that the above instruction should be given in all subsequent cases].

UTAH

Currently approved instruction:

I have heretofore told you that the burden is upon the State to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Now by a reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt which is merely fanciful or imaginary or based on a wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it and obviates all reasonable doubt. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or the lack of evidence in this case.

Case law:

State v. Johnson, 774 P.2d 1141 (Utah 1989)
State v. Huston, 811 P.2d 929 (Utah App. 1991)

VERMONT

Currently approved instruction:

No statewide pattern instruction.

Case law:

State v. Francis, 561 A.2d 392 (1989) [no definition or explanation of reasonable doubt required].

VIRGINIA

Currently approved instruction:

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. The presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case. (Pattern instruction 2.100)

Case law:

Cooper v. Comm., 345 S.E.2d 775 (Va.App. (1986) [discourages explanations of reasonable doubt].

WASHINGTON

Currently approved instruction:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The state is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. (WPIC 4.01)

See also WPIC 4.01A (simplified alternative):

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason can be given and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence."

WEST VIRGINIA

Currently approved instruction:

No statewide pattern instruction.

Case law:

State v. Beckett, 310 S.E.2d 883 (W.VA.1983) [discourages explanations].

WISCONSIN

Currentlly approved instruction:

Wis.J.I.—Crim. 140 includes language that "a reasonable doubt is a doubt for which a reason can be given"; "a doubt which ignores a reasonable interpretation of the evidence is not a reasonable doubt"; and "you are to search for the truth and give the defendant the benefit of a reasonable doubt if it exists in your minds after you have carefully considered all of the evidence in this case."

Case law:

State v. Bembenek, 331 N.W.2d 616 (Wis.App. 1983) [approving pattern instruction].

WYOMING

Currently approved instruction:

Explanation or definition prohibited.

Case law:

Collins v. State, 854 P.2d 688 (Wyo. 1993) [prohibits definitions or explanations].

DISTRICT OF COLUMBIA

Currently approved instruction:

Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration

of all the evidence, to be so undecided that he cannot say that he has an abiding conviciton of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty. Rather, its burden is to establish guilt beyond a reasonable doubt. (District of Columbia Criminal Jury Instructions no. 2.09 (3d ed. 1978))

Case law:

United States v. Merlos, 984 F.2d 1239 (D.C. Cir. 1993) [approving above instructions].